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A COMPARATIVE STUDY
OF THE
INDIAN CONSTITUTION

BY

SIRDAR D. K. SEN, M.A., B.C.L. (OXON)
OF GRAY'S INN, BARRISTER-AT-LAW



VOLUME ONE

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TO
PANDIT JAWAHARLAL NEHRU

FIRST PRIME MINISTER OF THE REPUBLIC OF INDIA

THIS VOLUME
IS
BY HIS KIND PERMISSION
RESPECTFULLY DEDICATED

PREFACE

THE INDIAN CONSTITUTION, says Sir Ivor Jennings, "is impregnated with the idea that law and government are dangerous and ought to be kept in concentration camps." With due deference to the eminent publicist, it is submitted that there is not one iota of evidence in the entire Constitution which lends support to this statement. On the contrary, even a cursory examination of its provisions clearly indicates the primacy of the executive governments established under the Constitution. Sir Ivor himself furnishes the most destructive criticism of his view when he speaks of "the vast powers which are legally vested" in the President of the Union and the Governors of the States. If the Indian Constituent Assembly really distrusted law and government, as Sir Ivor tries to make out, surely it would not have conferred such immense powers on the executive authorities of the Republic. The point is made clear beyond doubt when one examines the Chapter on Emergency Powers which has no parallel in any existing or defunct constitution, apart from Article 48 of the Weimar Constitution. Indeed, these powers of the Union Government are far more extensive than those which can be claimed under the system of *estado de sitio* in the Latin American States or even under the doctrine of *Notrecht* which has recently been developed in the Swiss Confederation under the influence of German jurists. Sir Ivor's criticism of the Indian Constitution on this ground has, therefore, no foundation, either in fact or in theory.

Equally untenable is the argument advanced by Sir Ivor that the Indian Constitution "is dominated by a view of constitutional law which most constitutional lawyers now regard as outmoded, a view which derives from the works of Albert Venn Dicey." Whatever doctrinaire views might have been expressed by the members of the Constituent Assembly, the Indian Constitution does not contain any academic theories or political philosophies, apart from "the Directive Principles of State Policy" which, it should be remembered, have no legal force or authority. It is necessary to emphasize in this connection

that the Drafting Committee of the Constituent Assembly, which was primarily responsible for the Constitution as it stands today, consisted of seasoned administrators and eminent lawyers with practical experience of the working of the administration. The result is that the Indian Constitution does not contain any aprioristic views; nor is it a "professorial constitution" of the kind evolved in Germany and Austria under the influence of Hugo Preuss and Hans Kelsen. It is, therefore, difficult, if not impossible, to find even a trace of Dicey's views anywhere in the Constitution. On the contrary, some of its provisions, as, for example, the declaration of fundamental rights, are diametrically opposed to Dicey's concepts of constitutional proprieties. Further, the two outstanding features of the Indian Constitution are the rehabilitation of the executive authority associated with the British Viceroys and the grafting of democratic principles on the framework bequeathed by the Government of India Act, 1935. It is obvious that neither of these features owes its existence to the views and theories propounded by Albert Venn Dicey. Nor does the Indian Constitution provide any evidence of any "outmoded" view of constitutional law. Indeed, Sir Ivor's own views appear to be "outmoded". For instance, he describes as "curious" the dichotomy of individualism and collectivism which he finds in the Indian Constitution, but completely ignores the fact that this dichotomy has its counterpart in the latest constitutional developments in Europe, not only in the Welfare State of Great Britain but also in the preamble to the French Constitution of 1947 and in the Italian Constitution of 1948. He also brushes aside the whole trend in the recent development of fundamental rights since the Mexican Constitution of 1917 and the Weimar Constitution of 1919.¹

These criticisms have been discussed here to show that ill-considered opinion and preconceived notions cannot assist us in comprehending the general character and principles of the Indian Constitution. Therefore, while one should welcome any criticism which comes from foreign publicists as being independent and impartial, it is clear that no value or significance can be attached to such *ex cathedra* observations as we gather from Sir Ivor's little volume on the Indian Constitution. On the other hand, there is a strong tendency amongst us in India which might aptly be described in Garcia-Pelayo's words as "a species of deification of the Constitution". We are inclined to

¹ See Pergolosi, *Orientamenti sociali delle costituzioni contemporanee*; Westphalen-Fürstemberg, *Das Problem der Grundrechte im Verfassungsleben Europas*, p. 1 et seq.

regard the Constitution as sacrosanct and immutable, almost as holy as the *Dharmashastras*. This attitude of mind was abundantly in evidence when the first amendment to the Constitution was placed before the Union Parliament, and aroused a chorus of disapproval and opposition. Allegiance to the Constitution is an essential obligation of citizenship; and respect for its provisions is an imperative necessity in the interest of the government of the Republic. This does not, however, mean that we should totally ignore the defects and deficiencies of the Constitution resulting from *lacunae* or faulty drafting. It is, therefore, essential that when one examines the Constitution one must discard this attitude of mind and adopt a detached point of view.

There is another difficulty which confronts every student of the Indian Constitution. It is almost axiomatic to assert that the constitution of a State is not merely what has been set forth in the constitutional document but is also to be ascertained from political practice as well as from judicial interpretation. Therefore, the practice and procedure followed by the Government of a State, particularly in times of stress and storm, assume considerable importance from the constitutional point of view. So does the interpretation placed by the highest tribunals on the provisions of the Constitution. In the case of India, however, the first factor is totally absent. There has so far been no occasion on which the Government of the Republic have had to take any important decision in connection with the working of the Constitution. It is true that there have been important decisions of the Supreme Court but these have mainly been in the field of fundamental rights; and there is yet to grow up a body of authoritative decisions on many of the provisions of the Constitution. In these circumstances a critical and detailed examination of the Articles of the Constitution can only present a still-picture. In order, therefore, to obtain a correct appraisal of its precepts and principles it has been found necessary to follow the method of analysis and comparison. An attempt has accordingly been made to deduce the fundamental concepts, and then to examine them in the light of the constitutional laws and practice of other States.

Here a note of warning must, however, be sounded. In the first place, the same constitution may in a different political climate yield entirely different results. For instance, the constitutions of the Latin American States were modelled on the constitutional pattern of the United States of America, but in reality they present a

totally dissimilar picture. Secondly, political or constitutional terms may mean different things in different countries. For instance, the term "democracy" has acquired a strange and peculiar meaning under the Soviet Constitution. Exactly similar is the case of the term "fundamental rights". According to Soviet jurists, as is evident from Vyshinsky's *Sovetskoe Gosudarstvennoe Pravo*, the term has a meaning and significance which would be completely unacceptable to the jurists of the Western countries. It must, therefore, be admitted that the comparative method does not necessarily imply anything more than a comparison of the externals; nevertheless, it does provide a clearer picture than would otherwise be available.

As the cardinal feature of the Indian polity is its federalism, comparison has in the main been restricted to federal constitutions. For our purposes these may be classified under three categories. To the first belong the federations governed by the principles of the common law of England. These include the Dominions of Canada and Australia as well as the United States of America. There are important points of similarity between these Constitutions and the Constitution of the Indian Republic. For instance, the same system of double enumeration of powers is to be found both in Canada and India, and both the Constitutions assign residuary power to the Federal Legislature. Therefore, the decisions of the Judicial Committee of the Privy Council as well as of the Canadian Courts on the British North America Act have a great deal of practical value in the interpretation of those provisions of the Indian Constitution which deal with the distribution of legislative powers. Similarly, the decisions of the Supreme Court of the United States have an important bearing on several problems which arise under the Indian Constitution, particularly in the field of fundamental rights. Moreover, these three Constitutions as well as the Constitution of India are governed by the same principles of jurisprudence and the same rules of interpretation, since all of them are subject to the authority of the common law.

The second category comprises the Federations of Argentina, Brazil and Mexico. There is a particular reason for comparing the constitutional principles of these federations with those of the Indian Republic. As we have already seen, the two outstanding features of the Indian Constitution are a strong executive authority inherited from the viceregal regime and the democratic principles of individual liberty. Both these concepts have been embodied in clear and un-

mistakable terms in the constitutions of these Latin American States, although sometimes with a totally different effect in actual practice. This similarity may in the case of Argentina be attributed to the similarity of the historical antecedents. Like India, Argentina was under the absolute rule of the viceroy of a foreign Power, and, therefore, when she became independent of Spain, it was considered necessary that the authority of the viceroy should be maintained but in a democratic form. This was the principle which was emphasised by the Argentine jurist, Bautista Alberdi, whose *Las Bases y Punto de Partida* formed the basis of the Argentine Constitution of 1853. It would, therefore, be evident that these Latin American Constitutions contain many points of interest to students of the Indian Constitution.

This third category includes the Constitution of the Swiss Confederation, the Austrian Constitution of 1934 which has been revived after the Second World War, the Constitution of Western Germany and the now defunct Weimar Constitution of Germany. All these constitutions are federal in character and present striking points of contrast and similarity. They also throw considerable light on the various problems which are likely to arise under the Indian Constitution. Finally, although belonging to this group of European Federations, the Soviet Constitution stands by itself because of its different ideological background. Further, there is in Soviet Russia considerable divergence between constitutional practice and the text of the Constitution. It is, therefore, difficult to assess the significance of its provisions with any degree of certainty, and still more difficult to make any comparison with the Indian Constitution. There is nevertheless a point of striking similarity between the political environment of the two constitutions. Soviet Russia is entirely governed by one political party, and this has necessarily contributed to her strength and solidarity in spite of the loose character of the federal nexus. Similarly in India the predominance of one party throughout her territories has not only added to the strength and vigour of the Republic but has also tended to accentuate the centralism of her Constitution.

Apart from the comparative survey of federal constitutions, references have also been made, whenever considered necessary, to the principles of democratic constitutions of a unitary character. These include not only the Constitution of Great Britain, the cradle of parliamentary democracy, but also the Constitutions of Belgium,

France, Holland, Italy, Norway and Sweden and the Constitutions of Asian countries like Japan, China and Burma. It would, therefore, be obvious that while the present study offers a constructive analysis of the principles of the Indian Constitution, it also attempts to follow the illustrious example set by Esmein in his *Éléments de droit constitutionnel français et comparé* and by García-Pelayo, the Spanish jurist, in his recently published work, *Derecho constitucional comparado*; to both of whom the author gratefully acknowledges his indebtedness. The author is also indebted to Jellinek's *Allgemeine Staatslehre*, and Santi Romano's *Principii di diritto costituzionale generale*, perhaps the most outstanding contribution by an Italian constitutionalist.

The author also wishes to express his deep sense of obligation to the publicists whose contributions on politico-constitutional theory and practice have been included in the Bibliography. Here it seems necessary to point out that not many of these works are in the English language. Every student of constitutional laws will readily agree that greater than the conquests of the British armies have been the conquests of the British concepts of freedom and democracy and that every existing constitution has been directly or indirectly influenced by the basic principles of English constitutional law. It is, therefore, a matter of surprise that sufficient importance has not been attached by British publicists to the comparative study of constitutions, particularly in regard to the impact of the British principles of democracy and liberty on political development in other countries. One of the few exceptions is Finer's illuminating and instructive study, *The Theory and Practice of Modern Government*. In the United States of America, on the other hand, greater attention has undoubtedly been paid to this particular branch of law, but it has to be admitted that the most comprehensive work on the subject by an American, Peaslee's *Constitutions of Nations*, is merely a compilation and not a critical appreciation of the constitutional theory and practice of States.

Living amidst the isolated peaks of the Himalayas, the author has had to depend largely on his own collection of constitutional texts, commentaries and law reports from various parts of the world. But his task would have been almost impossible if he did not have the opportunity of availing himself of the excellent facilities afforded by the British Museum and the Honourable Society of Gray's Inn in London, and he takes this opportunity to express his grateful thanks to the authorities of these two institutions.

D. K. S.

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ERRATA

- Page 17, line 9, for "Inter-statal commerce" read "Inter-State commerce".
- " 21, line 7, substitute "colon" for "full stop" after the word "thus".
- " 34, line 16, for "datinct" read "distinct".
- " 68, line 3, for "(uow C.J.)" read "(afterwards C.J.)".
- " 70, line 18, for "meaning o" read "meaning of".
- " 82, line 25, for "Lord Akin" read "Lord Atkin".
- " 132, line 35, the reference for *Montreal Street Railway Co. v. City of Montreal* should be: 1912 A.C. 333.
- " 177, line 19, the reference for *Dwarkanadas Shrinivas v. Sholapur Spinning & Weaving Co.* should be: A.I.R. (1945) S.C. 199.
- " 184, line 14, for "clair" read "clear".
- " 199, line 14, for "executive" read "execute".
- " 211, line 4, for "representation" read "representatives".
- " 239, last line, for "Legislative" read "Legislature".
- " 245, line 34, read "full stop" after the words "of the States".
- " 251, fn., line 2, for "taking" read "taxing".
- " 301, line 17, for "additon" read "addition".
- " 314, line 1, for "consequences" read "consequences".

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PART I
INTRODUCTORY

CHAPTER I

THE CONCEPT AND CLASSIFICATION OF CONSTITUTIONS

The Origin of Constitutions. Aristotle has rightly described man as *zoon politikon*, a political animal. The evolution of man clearly shows that he cannot, as a general rule, live in isolation; his nature and disposition, his temperament, his needs and necessities and the natural urge within him lead him to associate with other fellow individuals. This is what modern psychology describes as the herd-complex. To this must also be added the ego-complex, particularly the instinct of self-preservation. Hence from the very dawn of history we find mankind living not in isolation but in association. This process of human development is clearly to be seen in the earliest periods of Indian history. As Vinogradoff points out, the most ancient human institution was marital relation, which was the foundation of the primordial family of husband, wife and children. This is the germ from which there gradually grew up the Hindu joint family comprising all descendants from a common male ancestor. The expansion of the patriarchal household in its turn led to the establishment of the system of clans. "All the members of the clan traced their pedigree from one original household and all regarded themselves as having a share by right in the territory held by the collective body of the clan."¹ The principle of agnation was not, however, the only factor in this process of development. According to Vinogradoff, around a kernel of agnate relationship supplementary cognate alliances were formed for the purposes of self-defence and material necessity. Similar motives led some of the clans to combine with other clans in tribal federations. It is from these two forms of association founded upon blood relationship and strengthened by the factor of common residence that there has emerged the organization

¹ Vinogradoff, *Historical Jurisprudence*, Vol. I., Chap. VIII,

which we know today as the State. Thus, for instance, during the sixth century B.C. there were in India two corresponding forms of State: territorial kingdoms ruled over by territorial sovereigns (*janapadeswara*); and autonomous clans with republican or oligarchical governments, such as the Sakya State of Kapilavastu.¹

Although much of the evidence is traditional and legendary, all authorities agree that the same process of development is to be found in the ancient history of Greece. The earliest institution of human organization in Greece was the gens composed of the family clans embracing all those who bore the common name. The gentes had both cultural and tribal significance. As Glotz has pointed out, "it included all those who worshipped the same ancestor, all those in whom ran the same blood, all those who could claim that they had drunk the same milk."² This organization founded entirely upon blood-relationship gradually gave way to a larger and more stable organization founded upon occupation of a particular territory. In other words, family organization gave way to territorial association, and this came to be known as the *polis* or the State.

This process of development from a small collective group to an organized State led to the establishment of two different systems of laws distinct and separate and yet an integral part of the legal order of the State. In the first place, there were the laws of conduct. When man became a member of a human group or society he began to realize that the rights and interests which he claimed for himself must also be claimed by his fellow members. This recognition of mutual rights and obligations was the source of a series of rules governing the relations between the members of a human group. Such rules were to be found in the elaborate customary laws of the clans and tribal organizations before the emergence of the State. But these laws of conduct were not sufficient by themselves. In the first place, it was necessary that there should be some authority to determine what should be the laws of conduct applicable in a particular case and to enforce their application. Secondly, it was also necessary that there should be some authority to settle any dispute between the members of the same organization. Hence arose the State and with it an elaborate organization of its power. Thus followed the second category of laws, the laws of State organization. Ancient Hindu jurists averred that the State as well as the system of kingship

¹ *The History and Culture of the Indian People*, Vol. II., pp. 2-3.

² *Histoire Grecque*, Vol. I., p. 119.

arose out of fear of anarchy, and consequently the primary obligation of the king was to protect his people. Indeed, this obligation was implicit in the term *nripa* (king) which, according to its derivation, means one who protects mankind. Correlative to the right to protection was the obligation of the subjects to pay taxes to the king.¹ Thus came into existence what has been called *rajdharma*, the principles of law dealing with kingly power and duties as well as the rights and obligations of the subjects. It is clear that both these species of laws were an integral part of the legal order of the State, since without the laws of organization the laws of conduct could not be maintained, and without the laws of conduct the laws of organization would have no meaning or significance.

The development of human society clearly shows that the State, like the ancient tribal organization, is an entity which aims to secure the peaceful co-existence of the members of a human group. Whatever be its origin, the State, therefore, has the monopoly of power and, by virtue of this monopoly, is able to ensure the continuance of the legal order. But the monopoly of power can only be vested in a specified person or group of persons, and in order to be effective must be organized in accordance with certain rules. Accordingly, it is essential to the existence of the State to establish rules which lay down: (a) the authorities competent to exercise the power of the State, (b) the principles governing the exercise of such power, (c) the procedure for the exercise of such power, and (d) the rights of the individual as against the authorities. The body of rules which deal with these four principles of the organization of a State forms its constitution. The term "constitution" is as old as Aristotle and carries the same meaning as under Roman law: *rem publicum constituere*. It should also be noted that the *rajdharma* or *rajniti* of the earliest Hindu constitutionalists was primarily composed of laws and rules of this character. Thus, an important portion of Kautilya's *Arthashastra* deals with the organization of the State and the relations between the king and his subjects.

The Meaning of Constitution. From the foregoing discussion it would be clear that the constitution of a State has to deal with two important problems. The first is the problem as to who shall exercise the powers of the State, i.e. who shall be vested with the authority to issue commands and to enforce such commands, for the functions of

¹ Kautilya, *Arthashastra*, Chap. XIII.

an institution cannot be discharged by itself but must necessarily depend on intelligent and voluntary acts of human beings. The character of the constitution is, therefore, determined by the answer to this question. Further, the functions of the State are discharged by human beings by virtue of the fact that they form part of the organs or institutions of the State. The first problem, therefore, involves (i) the creation of organs of the State, and (ii) the vesting of powers and functions in one or more of these organs. The second problem relates to the method and manner of the exercise of the power of the State; in other words, it raises two questions: (i) what should be the procedure for the exercise of the power of the State, and (ii) what should be the limitations on the exercise of such power. These are questions of fundamental importance and their solutions affect the character of a constitution. Are the powers of the State to be classified according to their nature, and is each category of power to be vested in separate and independent organs, as is the case with all democratic constitutions of today, or are they to be vested in one and the same organ: a principle which was embodied in the Soviet Constitution of 1925? The second question is equally important: are any limitations to be placed on the exercise of power by the organs of the State? This primarily raises the problem of fundamental rights. For instance, all modern constitutions guarantee certain specific rights to the citizen, and such rights cannot be abrogated or abridged in any manner by any organ of the State except under circumstances provided for by the constitution.

It follows, therefore, as a logical corollary that the term "constitution" means and signifies the body of laws and regulations which (a) deal with the organization of the State, (b) demarcate the sphere of the various organs of the State, and (c) govern the relations between citizens, on the one hand, and the State and its organs, on the other. It has been said that "a constitution means a document having a special legal sanctity which sets out the framework and the principal functions of the organs of government of a State and declares the principles governing the operation of these organs."¹ Burdeau, on the other hand, describes a constitution as "the statute of power". He contends that it is the constitution which links the power of the State with the idea of law, thus imposing directives and methods for its exercise. The constitution is, therefore, the channel through which simple

¹ Wade & Phillips, *Constitutional Law of England*.

political power is converted into an institution of the State, since it establishes the State as an abstract support of power. As a result of this nexus between the power of the State and law, law not only governs the relations between the government and the governed but becomes the foundation of the political order, thus giving to the power of the State a basis, a justification and a juridical structure. Considered from this point of view, a constitution is nothing but the "institutionalization of power". Secondly, a constitution is a statute in accordance with which the authorities exercise power. "The origin of the authority of the Government is the constitutional validity of its investiture; its character is that which is defined by the form of the regime adopted by the constitution; its objectives are those prescribed by the concept of law implicitly recognized by it; its limits are those which result from the constitutional regulation of its foundation."¹ Other publicists have defined constitutions as "a system of competences".

These views do not, however, appear to be tenable. In the first place, it is not correct to say that the constitution of a State is a document. A State may have a constitution without any written document. Indeed, the history of the ancient city-States of Greece and Rome clearly shows that the constitution of a State may entirely consist of unwritten customs and usages. Although it is true that almost all modern States have written constitutions, it is at the same time true that one of the most important constitutions of the world is not a document of any kind. The Constitution of Great Britain consists of statutes which are written, judicial decisions which are not contained in any particular documents and constitutional conventions which are unwritten. Further, even in countries with written constitutions, the actual working of the constitution has led to the growth of a large number of customs and usages which are not to be found in any document. It is, therefore, clear that it is entirely erroneous to define a constitution as a document. Secondly, it is not correct to assert that all constitutions have a special legal sanctity. It is true that most written constitutions enjoy what French publicists have called "super-legality", because they cannot be altered or amended like ordinary laws and a special procedure has to be followed for their amendment. There are, however, other constitutions, both written and unwritten, where there is no fundamental distinction

¹ Burdeau, *Traité de Science Politique*, Vol. III., pp. 138-139.

between ordinary laws and constitutional laws; both can be amended or altered in the same manner, and the constitution has, therefore, no special sanctity. The above views also completely ignore an extremely important part of the constitution of a State. They speak of the principal functions or competence of the organs of government. They also refer to the principles governing the operation of these organs. But they do not take into consideration the importance of the rules regulating the relations between the organs of the State, on the one hand, and citizens, on the other. In ascertaining the exact character of a constitution the first point to remember is that the constitution of a State is the pattern of its political organization. Secondly, it regulates the functions and competence of each organ of the State. Thirdly, it demarcates the sphere of individual liberty. The constitution of a State may, therefore, be defined as the pattern of its political organization and the body of laws which govern the relations between the various organs of the State as well as the relations between these organs and the citizens of the State.

The Meaning of Democracy. This preliminary discussion leads us to the examination of the various types of existing constitutions. At the outset it should be remembered that almost all modern constitutions are of a democratic character. The mere fact that a State has a monarchical form of government does not affect its democratic character. For example, the monarchical constitutions of Great Britain, Belgium, Sweden, Denmark and Norway are democratic in spite of the fact that the Head of State in each of these countries is a hereditary ruler. Two exceptions to this statement are the Constitutions of Persia and Afghanistan. In Persia greater powers have been vested in the hereditary rulers, and the constitution cannot, therefore, be described as democratic. In Afghanistan, on the other hand, the form of government is oligarchic, the power of the State being enjoyed and exercised by a small body of privileged persons.

The question, therefore, arises: what is the exact meaning of the term "democracy". Most American publicists as well as some English authors begin their discussions on this subject with an extract from the famous speech of President Lincoln at Gettysberg, in which the President described the American Republic as "the government of the people by the people for the people". Does this description contain the essential elements of a democratic constitution? In the first place, it describes democracy as the government of the people, but it

should be remembered that all constitutions, whether democratic or otherwise, deal with the government of the people, because without the people, there could be no State, and, therefore, no constitution. It would, therefore, be clear that this is not an essential feature of democracy. The second element, according to the President's definition, is "the government for the people". Here, again, it is necessary to point out that this is not a distinctive characteristic of democracy, because even under a system of benevolent despotism, the government is carried on for the people and in the interests of the people. In the third place, the description speaks of "government by the people"; and here indeed lies one of the distinctive elements of democracy, for a democratic constitution implies three essential attributes: (a) the power of the State is vested in the people; (b) the power is exercised by the people or their representatives; and (c) the people being the ruler as well as the ruled, there is complete identity of interests.

According to Bryce, government by the people is government by the majority of the people, and this means that in a democratic State all citizens must have full political rights so that the vast majority of them constitute the electorate.¹ This definition does not appear to be satisfactory. Government by the people or by the majority of the people is perfectly compatible with an authoritarian régime where there exists only one political party. A democratic government is not, therefore, merely a government by the people or by a majority of the people. It must have other essential qualities to distinguish it from other forms of government. In a totalitarian form of government certain characteristic elements are to be found. In the first place, all powers of the State are vested in one organ or institution; in other words, there is unity of State authority. Besides, it is the will of those in whom the totality of the powers of the State is vested which prevails against the will of those who do not enjoy or exercise any power. There is thus a legal distinction between those who command and those who obey. On the other hand, in a democratic form of government there is a clear division of power; in other words, there is a plurality of State organs. There is also the important principle of respect for and protection of the minority so that there is every chance of the minority becoming the majority; and this operates through the fundamental principles of equality and liberty. A government where these elements subsist has a democratic constitution.

¹ *Modern Democracies*, Vol. II., Chap. I.

This brings us to the question of forms and institutions of democracy. There are two distinct and well-recognized types of democratic government. The first is known as direct democracy, i.e. where the power of the State is directly exercised by the entire body of citizens of the State. Such a type is, however, only practicable in a State with a small compact territory and a small homogenous population as was the case with the city-States of ancient Greece and Rome and the village republics of India and China. The same type of government was to be found in some of the Cantons of Switzerland, and even today some of them retain the relics of the system, such as the referendum, popular initiative and plebiscite. The second form of democracy may be described as indirect, i.e. where the power of the State is exercised by the people not directly but through elected representatives. The suffrage under a democratic system has the following essential features: (i) it must be universal, i.e. the electorate must be composed of all citizens without any distinction who fulfil certain specified qualifications; (ii) the suffrage must be direct; (iii) the suffrage must be equal; and (iv) the suffrage must be secret. To these must also be added the indispensable condition that every citizen must have the right to stand for election provided he fulfils certain specified qualifications. It is this feature which differentiates democracy properly so-called from the authoritarian system under the Soviet Constitution where one party and one party alone has the monopoly of eligibility and, therefore, of political power.

Three Forms of Democratic Constitutions. The first important classification of constitutions is founded upon the doctrine of separation of powers. The doctrine traces its lineage to Aristotle and was elaborated in England by Locke and in France by Montesquieu. It was under Montesquieu's inspiration that the theory became one of the cardinal factors in the shaping of the Constitutions of the United States of America and of several European countries. According to this theory, there are three kinds of powers in every government: legislative, executive and judicial. When these three powers, or any two of them, are united in the same organ, there can be no liberty, because apprehensions may arise lest the monarch or the legislature should enact tyrannical laws and execute them in a tyrannical manner. Again, there can be no liberty if the judicial power is not separated from the legislative and executive. The life and liberty of the subject would be exposed to arbitrary control, for the judge would then become the legislator. As Wade rightly points out, the doctrine

has a three-fold significance: (i) that the same person should not exercise two or more different kinds of power; (ii) that one organ of the State should have no power to interfere with or control another organ; and (iii) that one organ should not be in a position to exercise more than one kind of power. This theory assumed a great deal of practical importance and affected the development of constitutions both in the Old and the New Worlds. For instance, the French Declaration of Rights of 1789 expressly laid down that a constitution which does not provide for the separation of powers is no constitution at all.

The Presidential Regime. As a result of the influence exercised by the doctrine, three different kinds of democratic constitutions came into existence. The first is the Presidential regime where the separation of powers is practically complete. The most notable instance is the Constitution of the United States of America. The doctrine of separation of powers, as *The Federalist* pointed out, was an article of faith with the fathers of the American Constitution who regarded Montesquieu as their oracle. The American concept of the doctrine was founded upon the principle of legal equality between executive and legislative powers. It, therefore, established that legislative and executive organs must owe their existence to different sources. It provided that an individual could not be a member of both organs, and one organ could not terminate the existence of the other. The executive authority under the American Constitution is vested in the President whereas the legislative powers fall exclusively within the competence of the Congress. The judiciary is entirely different and independent. The executive is neither dependent upon the legislature nor upon the people. Nor is the executive responsible to the legislature, but in certain matters, as in the case of appointment of officials and conclusion of treaties, the assent of the Upper House of the Legislature is required. On the other hand, the President has the right to veto any legislation passed by the Congress. It will be seen, therefore, that the theory of separation of powers has been fully carried into effect under the American Constitution. The head of the executive is elected by the people, and so is the legislature. But the two are virtually independent of each other, and the principle of the responsibility of the executive to the legislature has no place in the American Constitution. The same system has been adopted in some of the Latin American States as well as under the recent Constitution of Tunisia.

The Directorial Regime. Under this form of democracy,

the functions of the State are broadly divided between the legislative, executive and judicial authorities. The judiciary is appointed, as in the United States of America, by the executive but on terms which render it practically an independent organ. The executive is formed of persons elected by the legislature for a specified period, but is not responsible to the legislature. Such is the system which prevails in Switzerland. Under the Constitution of 1874, the federal structure comprises three different organs: the Federal Council, the Federal Assembly and the Federal Tribunal. There is thus not only the separation of organs of the State but also the separation of powers. The executive authority of the Confederation is vested in the Federal Council which is not completely separated from the Federal Legislature, as in the United States of America. The Federal Council consists of seven members who are elected by the two Houses of the Federal Legislature at a joint session and hold their office for a period of four years. The Federal Council is, however, re-elected every time that a new Federal Assembly comes into existence. On the other hand, the Federal Council is not responsible to the Federal Legislature. It would, therefore, be clear that though there is a constitutional nexus between the executive and the legislature under the Swiss Constitution, the executive is practically independent of the legislature. There is also the division of powers between the three organs, but the division is not rigid, as the Constitution does not assign exclusive functions to each of the organs. For instance, the Federal Assembly, which is the legislature of the Confederation, discharges both judicial and executive functions. Similarly, the Federal Council has judicial powers under the Constitution. It has also acquired legislative powers not only by virtue of delegation but also in the process of normal legislation. An eminent publicist has, therefore, observed: "The separation of powers, at least so far as it relates to the executive and legislative, has been gradually reduced to the only rule that a Bill does not acquire the force of a law in normal times except after the approval of the two Houses."¹

Parliamentary Democracy. The third form of democratic constitution is the system of parliamentary democracy which was originally evolved in England and subsequently borrowed by other countries of Europe and Asia. Under this system the powers of the State

¹ Lachenel, *La Partie politique. Sa fonction de droit public*. Basle, 1944, p. 156.

are vested in three different organs. The executive authority consists of two parts. The first is the Crown or the Head of State who is not constitutionally responsible. Hence the maxim of the common law: the King can do no wrong. The second part of the executive is the Cabinet which exercises all executive powers in the name of the Crown. The Cabinet consists of members of the legislature who are constitutionally responsible to the Lower House of Parliament, as in England, or to both Houses of Parliament, as in Italy. The Cabinet represents the majority party in the legislature or a coalition of parties and continues in office so long as it retains the confidence of the majority of the legislature. It will, therefore, be seen that unlike the Presidential regime, the system of parliamentary democracy connotes a close constitutional nexus between the legislature and the executive. Further, although there are different and separate organs of the State, the division of powers is not strict or absolute. Corresponding to the principle of ministerial responsibility is the right of the executive to demand the dissolution of the legislature in the event of a conflict. The most distinctive characteristic of the system is, however, the basic principle that the ministers are jointly and severally responsible to the legislature.

The Principle of Ministerial Responsibility. This expression has a two-fold significance. In the first place, it means that in law some minister is responsible for every executive act of the Crown. As Dicey points out, "behind parliamentary responsibility lies legal liability, and the acts of ministers no less than the acts of subordinate officials are made subject to the rule of law." Orders-in-Council, Royal Warrants, Proclamations etc., whereby the Royal Will is expressed must be countersigned by one or more ministers, who thereupon become answerable in the courts of law for any illegality to which these instruments may seek to give effect. This is a direct consequence of the maxim that the King can do no wrong; it implies that for every exercise of the prerogative, the King is not but some minister is answerable.

Secondly, the term "ministerial responsibility" means the political responsibility of the ministers. This has a two-fold significance: (i) the ministers are responsible as a body for each department for general policy: this is the principle of collective responsibility; and (ii) every minister is responsible individually for the work of his department. According to Finer, "responsibility means that a position of trust is held, that is, that power can only be used within

certain defined limits. The question then is who draws those limits, who watches over them and what is the punishment for their violation.¹ In England until 1689 the limits were drawn by the Crown but since then it has been the House of Commons. The principle of collective responsibility was thus described by Lord Salisbury: "For all that passes in Cabinet each member of it who does not resign is absolutely and irretrievably responsible, and has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by his colleagues. It is only on the principle that absolute responsibility is undertaken by every member of the Cabinet who, if a decision is arrived at, remains a member of it, that the joint responsibility of ministers of Parliament can be upheld, and one of the most essential principles of parliamentary responsibility established." The logical corollary of this principle is that a minister, who is not prepared to defend a Cabinet decision, must resign. For instance, in 1853, Lord Palmerston resigned because he could not agree to Lord John Russell's Reform Bill, though afterwards he withdrew his resignation. Similarly, in 1932 Viscount Snowden and others resigned because they could not support the Ottawa Agreement. If a minister does not resign, he is responsible. The same convention is to be found in other parliamentary governments. A typical instance is furnished by the constitutional history of France. In 1905 the arrival of the German Emperor at Tangiers created a diplomatic tension between France and Germany. There was a divergence of views between M. Rouvier, the Prime Minister, and his Foreign Minister, M. Delcassé, on the question of the proposed international conference at Algecieras. The Cabinet unanimously decided to participate in the conference, but this was not accepted by M. Delcassé. He was consequently obliged to resign, but the Rouvier Cabinet continued in office.² The same view prevailed under the Italian Constitution of 1848. In 1879 Signor Cairoli, the Prime Minister, affirmed that it would be absurd to permit a minister to differ from the Cabinet on an important question, and if he did actually protest against the decision of the Cabinet, he would have to resign.³ An extreme case is that of the dismissal of the Finance Minister, Scismit-Doda, by the King on the ground of his differences with the Prime Minister, Signor Crispi.

¹ Soulier, *L'Instabilité ministérielle*, p. 353.

² Meloni, *I poteri del capo dello Stato e la responsabilità individuale dei ministri*, *Rassegna di diritto pubblico*, 1948, pp. 281 et seq.

Conversely, the principle of collective responsibility implies that the Cabinet must resign if a minister is defeated on an important question affecting the general policy of the Cabinet. The rule is that the defeat of a minister on any issue is the defeat of the Government. The proposals made by a minister, whether or not they have been approved by the Cabinet, are the proposals of the Government. An attack on a minister is an attack on the Government. This necessarily follows from the principle of collective responsibility. Thus in France in 1917, the resignation of the Ribot Cabinet followed the resignation of the Minister of the Interior. Violent attacks were made in the Press against the police and the Minister of the Interior. It was alleged that he was in communication with notorious spies who had been arrested. M. Malvy, the Minister of the Interior, resigned in consequence of these attacks. This was soon after followed by the resignation of M. Ribot and his Cabinet. The same procedure was adopted by M. Chautemps when two of his ministers were compelled to resign as a result of the attacks made against them in connexion with a judicial scandal. (Soulier, *op. cit.*, pp. 348-349).

This convention is, however, subject to the general rule that a minister is individually responsible for the department in his charge. Thus, though the Cabinet may accept responsibility for a minister's proposal, there is nothing to prevent it from bowing to the decision of the legislature and withdrawing the proposal. If the minister feels that his credit has thereby been impaired, it is customary for him to resign. Secondly, a Cabinet does not accept responsibility for a personal mistake made by a minister, or for an error of judgement on his part or on the part of his subordinates. "The process of government compels a delegation of authority. The Cabinet must leave to each minister substantial discretion as to what matters he will bring before it. If he makes a mistake, then he must accept the personal responsibility."¹ On the other hand, a minister cannot hide behind the error of a subordinate. There are two interesting instances illustrating this conventional practice in England. In 1932 Mr. Montague, Secretary of State for India, was persuaded by the Government of India to allow the publication of a telegram conveying the policy of His Majesty's Government in regard to the future of the Sultan of Turkey as the Khalifa of the Muslim world in order to pacify Muslim opinion in India. These views were not, however, acceptable to Lord

¹ Jennings, *Cabinet Government*.

Curzon, the Foreign Secretary, and the Cabinet, therefore, decided to disavow them. It was stated on behalf of the Cabinet that "His Majesty's Government are unable to reconcile the publication of the telegram of the Government of India on the sole responsibility of the Secretary of State with the collective responsibility of the Cabinet." As a result, Mr. Montague was obliged to tender his resignation. A similar situation arose in 1935 when Lord Templewood (then Sir Samuel Hoare), the Foreign Secretary, and M. Laval, the French Foreign Minister, agreed to a draft of a treaty with Italy for the settlement of the Italo-Abyssinian dispute. The draft had been generally approved by Mr. Baldwin, the Prime Minister. But when the terms of the proposed treaty came to be known to the Press and there was strong opposition in the House of Commons, Mr. Baldwin decided to disown the draft, and Lord Templewood was compelled to resign. A typical instance under the French Constitution is furnished by the case of M. Loucheur, the Finance Minister in the Briand Cabinet. In 1925 M. Loucheur found it difficult to convince the Finance Committee of the Chamber of Deputies of the necessity of the financial reforms which he had formulated and was thereupon compelled to give up the task. M. Briand, however, decided to replace him and the Cabinet continued in office. The principle of individual responsibility of ministers has now been expressly embodied in many recent constitutions, as, for instance, the French Constitution of 1947 and the Italian Constitution of 1948. The Indian Constitution, on the other hand, presents a curious feature. It prescribes the rule of collective responsibility of the Cabinet but does not lay down the principle of individual responsibility of ministers. It would, therefore, be obvious that the principle could only be introduced by constitutional convention. This is accordingly a matter within the exclusive domain of the Indian Parliament and could not be deduced by judicial interpretation from the text of the Constitution.¹

Rigid and Flexible Constitutions. All publicists distinguish between written and unwritten constitutions, although the distinction is somewhat superficial. A State is deemed to have a written constitution when the basic principles and institutions of its political organization are to be found in a document or a series of documents. Such is, for instance, the Constitution of the Indian Republic. Almost all modern States have written constitutions, the only exception

¹ The views recently expressed by the Chagla Commission on the question of the Finance Minister's personal responsibility may rightly be criticized on this ground,

being the United Kingdom of Great Britain and Northern Ireland where the fundamental political principles and institutions are not to be found in any formally accepted document or documents. As we have already seen, the sources of the British Constitution are many and various, and may generally be grouped under four heads: (i) statutes of the British Parliament; (ii) judicial precedents; (iii) customs and usages of Parliament; and (iv) constitutional conventions. Great Britain is, therefore, the only country which has an unwritten constitution. This distinction between written and unwritten constitutions has led to the establishment of a far more important classification of rigid and flexible constitutions. The idea of permanency is closely associated with the concept of constitution so much so that stability is considered to be one of its main attributes. Written constitutions are considered to be more permanent and, therefore, more rigid, because, generally speaking, they cannot be amended except by a special process or by means of a special machinery. Unwritten constitutions, on the other hand, are deemed to be flexible because they can be amended or altered by the ordinary process of legislation. It should, however, be noted that the distinction between rigid and flexible constitutions does not necessarily depend on the distinction between written and unwritten constitutions. A written constitution may be as flexible as an unwritten constitution. A typical instance is furnished by the Italian Constitution of 1848 which, according to the generally accepted view, could be amended by the ordinary process of legislation.

The distinction between rigid and flexible constitutions was pointed out for the first time by Bryce, and has now become a fundamental concept of constitutional law and practice. According to Bryce, there are two types of constitutions: those which have grown organically without any pattern either in their form or in their content and which consist of a variety of laws, conventions and customs. The second type is the result of systematic, exhaustive and conscious labour. The first type is derived from the same source as the ordinary laws and, consequently, may be abrogated or revised by the same organ and in the same manner as in the case of ordinary laws; and this he calls a flexible constitution. On the other hand, a rigid constitution is derived from a source other than that of ordinary laws and is of a rank superior to that of ordinary laws. It can only be annulled or amended by the same organ which created it or some other organ to which its power has been delegated. In other words, a rigid

constitution is one which demands for its amendment or revision a special machinery or a special method.¹ It, therefore, occupies a privileged position and possesses a greater guarantee of permanence: a situation which French jurists have described as constitutional super-legality. In theory, therefore, inflexibility is the essence of this system. A typical instance of a rigid constitution is furnished by the United States of America. Article 7 of the Constitution prescribes two different methods of amendment: (i) either two-thirds of both Houses of the Congress may propose amendments, or legislatures of two-thirds of the States may call a convention for proposing amendments, and (ii) the proposed amendments may be ratified either by three-fourths of the legislatures of the several States or by conventions of three-fourths of the several States. In fact, all amendments have taken place at the instance of the Congress and after ratification by the legislatures of the States. The rigidity of the American Constitution can be seen from the fact that between 1789 and 1890 some nineteen hundred resolutions were submitted to the Congress of which only nineteen obtained the necessary assent of the Congress and only fifteen received the necessary ratification. Strictly speaking, the Indian Constitution falls under the category of rigid constitutions, but, as we shall see, it is much more flexible than the Constitution of the United States of America. In fact, during the first seven years of its existence it has been amended as many as seven times.

The distinction between rigid and flexible constitutions should not, however, be regarded as absolute and final. Strictly speaking, the classification has no *fundamentum divisionis*. A so-called rigid constitution may, in fact, be more flexible than a so-called flexible constitution. For instance, the Constitution of England, although flexible, has in fact undergone very little change since its basic principles were finally settled. Since the beginning of the twentieth century there have really been only three statutory changes of an important character. These were the Parliament Act of 1911, the Representation of the People Act, 1918 and the Parliament Act of 1949. It may, therefore, be contended that rigidity is not necessarily a characteristic of the so-called rigid constitution. A more appropriate terminology was used by Lord Birkenhead in *McCawley's case*, (1920) A.C. 691, where he adopted the words "controlled" and "uncontrolled" constitutions to differentiate between constitutions which

¹ Bryce, *Studies in History and Jurisprudence*, Vol. I., pp. 145-254.

prescribe a special procedure of amendment and those which can be amended like ordinary laws. Further, although a constitution may belong to the class of rigid constitutions, its provisions may in actual practice be amended otherwise than in accordance with the special procedure prescribed by it. In the first place, it must be remembered that the meaning of a provision of a constitution depends on its actual wording, and words in a living language do not always have the same meaning and significance. For instance, the meaning of the words "inter-statal commerce" in the Constitution of the United States of America has undergone a considerable change in consequence of judicial decisions and has been extended to cover practically the entire economic life of the United States; and this change has been brought about without any amendment of the Constitution. Secondly, a constitution can only provide for and regulate the fundamental aspects of the political life of the State. It cannot deal with detailed particulars in respect of each and every contingency. Therefore, in the actual day to day working of a constitution, many changes are introduced as a matter of practice to supplement the express provisions of the constitution. Thirdly, every constitution is based upon certain fundamental principles and these are controlled and governed by the actual social and political circumstances prevailing at the time. Therefore, with changes in the circumstances, these fundamental precepts acquire new and fresh significance. A typical illustration is furnished by the Spanish Constitution of 1834 which prohibited the Cortes to deliberate upon any matter which was not especially submitted to it by virtue of a royal decree; in other words, the Cortes had no initiative in the matter of legislation. There was, however, an Article in the Constitution which empowered the Cortes to submit petitions to the King, and this power was utilized by the Cortes to initiate legislative measures.¹ Finally, the actual meaning of the provisions of a constitution depends largely upon the interpretation of the courts in the ordinary course of judicial proceedings. These decisions may, therefore, alter the entire character of a specific provision of the constitution. Thus, for instance, the defence power under the Constitution in the United States of America as well as in Australia has been so interpreted as to enlarge the scope of the authority originally granted to the Central Government.

Unitary and Federal Constitutions. The distinction between

¹ Garcia-Pelayo, *Derecho constitucional comparado*, pp. 123-124.

unitary and federal States constitutes the basis of a well-recognized classification in the domain of jurisprudence and constitutional law. Under a unitary constitution, all sovereign powers are vested in one single government which has complete authority over the entire territory of the State, all local or regional bodies being subject to its control. A unitary State may at the same time be decentralized, i.e. local or regional authorities may be created for the purpose of administering specified areas of the State, but these authorities can only exercise such powers as have been expressly conferred on them and remain always subject to the control of the central government. A composite State, on the other hand, necessarily implies the association, more or less complete and more or less durable, of several States under a common government or a common ruler. Laband classifies associations of States into two different and distinct categories: (i) association of States founded exclusively on agreement or treaty (*d'indole contrattuale*); and (ii) association of States of a corporate character. Confederation falls under the first category, while Federation furnishes an interesting example of the second.

It has been asserted by a publicist that there does not exist any distinctive mark of federation. It has been urged that "once a general name is given to a number of particular things in order to distinguish them from others, these things acquire a reputation for a distinction they do not in fact possess." Prailaune puts forward the view that "between the Confederation of States, the Federal State, and the unitary State which corresponds to a precise but arbitrary, academic classification, there exists a whole series of intermediate combinations."¹ It would, however, appear that these criticisms cannot be substantiated. It is no doubt true that there are certain features which are to be found both in federations and confederations of States; nevertheless a close and critical study of federal constitutions and an analysis of the theory of federation conclusively prove that a federal union of States possesses certain characteristics which differentiate it from other forms of State organizations. As Borel has rightly pointed out, "the historian and the jurist have two distinct domains and pursue two absolutely different objects. The first seeks, above all, to establish that irresistible continuity of facts which reveal a development of several centuries; the second, on the contrary, must distinguish, in that evolution sometimes imperceptible, the precise moment when the two notions, essentially different,

¹ Prailaune, *L'unitarisme et le fédéralisme dans la Constitution Allemande*.

of the Confederation of States and of the Federal State touch and separate from one another."¹ Further, the theory of "floating frontiers" (*flissende Grenzen*) cannot be sustained in law. Every legal classification must be clear and precise. We shall, therefore, proceed to analyse the constituent elements of a federation which distinguish it from other forms of association of States.

A confederation of States is an association of sovereign States in which there exists a central power possessing organizations of a permanent character. It is founded essentially on a treaty concluded amongst States which are and continue to be sovereign. It is in reality "a sum of attributes and powers founded on the free consent of the individual States united for their exercise in common."² A confederation does not, therefore, possess either sovereignty or the character of a State, the confederating States preserving their sovereign and independent existence subject to agreed restrictions. It, therefore, follows that a confederation is not a State, but merely a *vinculum juris*, ein *Rechtsverhältnis*, founded exclusively on an agreement or treaty. For instance, in the Swiss Confederation of 1815 the Federal Act was invariably construed as a *Vertrag* or treaty and not as a Statute or Constitution. The German Confederation (*Deutsches Bund*) created by the *Wiener Schlussakt* of 1820 was also a union of sovereign States founded upon a series of treaties. Similarly, the American Confederation of 1781 was only a "firm league of friendship" comprising States which retained their sovereignty, freedom and independence. A federation, on the other hand, is not only an association of States but also a State. As Bric rightly points out, "a federal State is at the same time an association and a State; . . . it is also, on the one hand, a federally organized community composed of States, and, on the other, a community of people whose chief duty and competence embrace the needs of human beings."³ It follows, therefore, that a federation is, on the one hand, a unity, and possesses all the features of an organic union *par excellence*, whereas a confederation is always to be distinguished, as Brunialti says, by "*la mancanza di coesione psicologica interna*." This is then the *fundamentum divisionis* between a federation and a confederation. On the other hand, a federation is also an association of States, and differs from unitary States which are not a union of constituent States.

¹ Borel, *Étude sur la Souveraineté dans l'Etat Fédératif*, p. 150.

² Brunialti, *Unioni e Combinazioni fra gli Stati*.

³ *Theorie der Staatenverbindungen*.

There are several results of the constitutional unity of a federal association of States. In the first place, it is inevitable that the central government in a federation should enjoy and exercise all rights and powers of external sovereignty. It is the federation alone which possesses international personality and is consequently the sole representative of the federating units in international law. For instance, under the Constitution of the United States of America it is the Federal Government which exercises all powers of sovereignty in regard to international matters, and the federating States have no personality or authority from the point of view of international law. Article 14 of the Soviet Constitution similarly states that the representation of the Union in all international affairs, the conduct of diplomatic relations and the conclusion of treaties with foreign powers belong exclusively to the competence of the Union. This view, however, has been criticized by Le Fur who holds that it is not correct to say that under a federation it is the federal government alone which possesses international personality.¹ He cites the instance of the German Federation of 1871 in which the States constituting the Federation did enjoy certain powers in regard to international affairs, as, for instance, the right of diplomatic intercourse with foreign States. This, however, does not mean that the constituent States of the German Federation were considered to be persons in international law. Le Fur is, therefore, clearly wrong when he says that the constituent elements of a federation also possess international character. It is no doubt true that in a federal constitution the units may be entitled to exercise such rights as rights of legation but this does not confer on them any international character, nor does it transform them into sovereign States from the point of view of international law. Further, it cannot for a moment be disputed that in cases of conflict with foreign powers it is the federation, and the federation alone, which is responsible in the eyes of international law even where the units enjoy and exercise certain powers of external sovereignty. (See Chap. XII.)

The second consequence of the organic unity of a federation is that in all federal constitutions federal laws override the laws of the constituent units in cases of conflict. As Jellinek remarks, *Bundesrecht bricht Landesrecht*. Provisions to this effect are sometimes expressly incorporated in constitutions. For instance, Article 13 of the German

¹ Le Fur, *Etat Fédéral et Confédération d'Etats*.

Constitution of 1919 provided: "The law of the Reich prevails over the law of the Landes."¹ Article 2 of the transitory provisions of the Swiss Constitution is to the same effect. Similar provisions have also been incorporated in Article 31 of the Argentine Constitution of 1853 and Article 126 of the Constitution of Mexico. The corresponding clause of the Constitution of the Commonwealth of Australia runs thus. "When the law of a State is in conflict with the law of the Commonwealth the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." It would, however, appear that this may not necessarily be a distinctive feature of a federal constitution. There may be a confederation of States in which it may be expressly provided that the regulations or decrees of the common government shall, within the limited scope of the legislative authority allotted to it, abrogate the laws and regulations of the constituent States. Whether in a particular case the laws of a confederation possess such exclusive and authoritative character will depend entirely on the terms and provisions of the convention creating the confederation. The mere fact that the constitution of a confederation expressly provides that all central decrees or resolutions shall override the laws and regulations of the States in regard to certain specified matters, does not necessarily transform the confederation into a federal State.

Another consequence of the constitutional unity of a federation is that in cases of conflict between the constituent units or between a constituent unit and the federation, the federal constitution invariably provides for the settlement of disputes by a federal authority. For instance, Article 110 of the Swiss Constitution states: "The Federal Tribunal takes cognisance of disputes of civil law: (i) between the Confederation and the Cantons, (ii) between the Confederation and corporations, and (iii) between the Cantons." Similar provisions are to be found in Article 105 of the Mexican Constitution and Article 100 of the Argentine Constitution of 1853. On the other hand, we find that in all confederations the pact of association has always provided for arbitration in cases of dispute. This again cannot be regarded as a fundamental characteristic of a federation since express provision for the settlement of disputes by a central authority and not by arbitration does not necessarily abrogate the essential feature of a confederation that it is an association and not a State.

¹ See Carré de Malberg, *La Théorie générale de l'Etat*, at p. 124.

Several other points of difference between a confederation and a federation have been urged by eminent jurists of different countries. It is, therefore, necessary for us to examine how far their arguments can be sustained. In the first place, it has been urged that a distinctive characteristic of a confederation is that the powers of the central organ are specifically and definitely enumerated, whereas in a federal constitution the rights of the component States are expressly declared, leaving the remainder of sovereign authority in the hands of the federal government. A cursory study of federal constitutions will, however, show that this argument is not sound either in theory or in practice. From the theoretical point of view it may be urged that the mere enumeration of the rights of the federal government does not necessarily conflict with the fundamental character of a federation. The view is also clearly opposed to facts. For instance, under the American Constitution the residuary powers of sovereignty are vested in the constituent States. Indeed, this is true of all federal constitutions except those of Canada and India. Further, as Le Fur points out, the difference is purely quantitative and not of the least significance in practice. (See Le Fur, *op. cit.*)

According to Bluntschli, "the real difference between a Confederation of States and a Federal State lies in the different organizations of the two forms of union."¹ He argues that in a confederation there is only one organ, a diet, a sort of congress of diplomats (*Gesandtenkongress*); whereas in a federal constitution the organization of government is complete from the triple point of view of the legislature, the executive and the judiciary. This view, however, will not bear scrutiny. In the first place, it does not take actual facts into consideration. For instance, the legislature as well as the executive were highly organized in the Confederation of the United Provinces of the Netherlands; there was, however, no organized judiciary of the Confederation. On the other hand, even under the German Federation of 1871 there was no judicial organization at the centre until the *Gerichtsverfassungsgesetz* (Judicature Act) of January, 1877. It is clear from these instances that differences in organization do not necessarily distinguish a federation from a confederation of States.

It has been argued that the real and fundamental difference between a federation and a confederation lies in the fact that under a confederation the constituent units stand on an absolutely equal

¹ Bluntschli, *Geschichte des Schweizerischen Bundesrechts*, Vol. I., at p. 562.

footing, whereas under a federation equality of the States is neither absolute nor indispensable.¹ This theory was propounded by Von Holst on the basis of the Confederal Constitution of the United States of America and is not in accord with other federal and confederal constitutions. For instance, under the German Confederation all constituent units were not equal in point of law. Bavaria, Wurtemberg and Saxony had special rights and powers which were not enjoyed by other States. Laband, on the contrary, holds that equality of the constituent units is an essential characteristic of federal constitutions. He says: "A Federal State is a Republic of which the States themselves are citizens and in which the sovereign power is exercised by the collectivity of the States considered as a unity. Thus, the German Empire, for example, is neither an Empire of forty million subjects nor a democracy of forty million citizens; it is a Republic of twenty-five members which collectively exercise the supreme power."² There is no doubt a certain element of truth in this contention. In many federal constitutions equality of the constituent units is to be found in the matter of representation in the federal legislature. For instance, equality of representation in the Upper House of the Federal Legislature is a cardinal feature of the Federal Constitutions of Switzerland, the United States of America, Mexico, Argentina and Brazil. In all these cases each federating State is entitled to two seats in the Upper House except Brazil where three seats have been allotted to each constituent unit. It is clear that in all these cases neither size nor population has been considered to be a material factor in determining the quantum of representation. The presence of this feature in the majority of the existing federal constitutions does not, however, mean that equality of the federating States is an essential characteristic of a federation. On the contrary, under a federal constitution representation in the federal legislature may be determined according to the size, population, and political importance of the constituent units, as in the case of Germany and Canada. Under the Indian Federation, representation in the Upper House has been based on several factors such as population, size, etc.

Bryce has argued that the superimposition of a central government over the authorities of the individual States is a fundamental characteristic of a federation, which distinguishes it from a confederation of States. He says: "The acceptance of the Constitution of 1789 made

¹ Von Holst, *Staatsrecht der Vereinigten Staaten von Amerika*, at p. 12.

² Borol, *op. cit.*, at p. 139.

the American people a nation. It turned what had been a league of States into a Federal State by giving it a National Government with a direct authority over all citizens."¹ This is only partly true, but the point of difference is not of a significant character as it is merely a difference of degree and not of quality. It is no doubt true that the central government in a confederation is not always of a highly organized character. It is equally true that the central government in a federal constitution embraces every sphere of governmental activity. It does not, however, follow that if the central government of a confederation is fully organized from every point of view, it necessarily comes under the category of federations. Take, for instance, the case of the Confederation of the Southern States of America which possessed a complete organization of legislature, executive and judiciary. This, however, did not bring the Confederation under the category of federal States. Further, as Westerkamp remarks, this argument merely points out the grave and frequent defect of a confederation that its central power is incompletely organized, but does not affect its juristic character.²

Closely associated with this view is the argument that the distinctive feature of a federation lies in the fact that its central government is invested with the authority to enforce its decrees and orders directly against individuals without the intervention of the authorities of the federating units. On the other hand, the principle of "mediatization" obtains in all confederations; in other words, under a confederation there is no direct connexion between the individual and the central authority. Jellinek has adopted this principle as the basis for the classification of States. He contends that if the State has the entirety of its functions exercised directly by agents created by itself and dependent upon it, then it is a centralized unitary State. If, on the other hand, the State uses corporate bodies, already in existence or created by it, to fulfil its purposes, it is a decentralized unitary State. But if the State maintains a direct relationship with the people and surrenders only a part of its functions to the member States, such a State governed by a constitution is a federal State.³ Calvo also argues that "the essential characteristic which distinguishes a confederation from a federation of States resides in the fact that in the former there does not exist a common executive authority which has

¹ Bryce, *The American Commonwealth*, Vol. I., Chap. IV.

² Westerkamp, *Staatenbund und Bundesstaat*, at p. 452.

³ Jellinek, *Die Lehre von den Staatenverbindungen*, pp. 276-278.

the right to impose its decrees in direct relationship with the subjects of the States."¹ It is true that a provision of this character is to be found in certain federal constitutions. In the American Federation, as Bryce points out, "the authority of the National Government over the citizens of every State is direct and immediate, not exerted through State organization, and not requiring the co-operation of the State Government." It is, however, submitted that this feature does not constitute a distinctive characteristic of a federation. Under a federal constitution the administration of federal laws may be left, within a restricted sphere, in the hands of the federating States; in such cases the federal authorities will not come into direct relationship with the citizens of the States. Thus, Article 11 of the Austrian Constitution of 1934 expressly provided that whereas legislation in regard to certain specified subjects shall be federal, the administration of such subjects shall vest exclusively in the government of the units. Further, the central government in a confederation may be invested with limited powers to act directly upon the subjects of the States, without the intervention of the State authorities. Such provisions will not, however, in any way affect the essential nature of a confederation.

This leads us to the examination of a theory of federation which has been enunciated in the judgement of the Privy Council in *The Attorney General for the Commonwealth of Australia v. Colonial Sugar Refining Co., Ltd.*, (1914) A.C. 237, where Lord Haldane, dealing with the question of Canada, said: "What happened was this: an Act was passed in 1867 which made a new start and divided certain powers of government, some being given to the Parliament of Canada, and some to the Parliament of the provinces. The provinces were created *de novo*. The provinces did not come together and make a federal arrangement under which they retained their existing powers and parted with certain of them and an Imperial Statute had got to ratify the bargain; on the contrary, the whole vitality and ambit of the Canadian Constitution was a surrender, if you like, first, and then devolution. . . . The meaning of a federal government is that a number of States come together and put certain of their powers into common custody, and that is the federal constitution in Australia, but Canada not at all The British North America Act of 1867 commences with a preamble that the then provinces have expressed

¹ Calvo, *Le Droit International*, at p. 179; Harrison Moore, *The Commonwealth of Australia*, p. 407; Scott, *The Canadian Constitution Historically Explained*, p. 3.

their desire to be federally united into one dominion with a constitution similar in principle to that of the United Kingdom. In a loose sense the word 'federal' may be used, as it is there used, to describe any arrangement under which self-contained States agree to delegate their powers to a common government with a view to entirely new constitutions even of the States themselves. But the natural and literal interpretation of the word confines its application to cases in which these States, while agreeing on a measure of delegation, yet in the main continue to preserve their original constitutions."

This pronouncement contains two important fallacies. In the first place, it ignores the very important fact that a federation may come into existence in two different ways. Sovereign and independent States may come together and make a federal arrangement in which they retain certain powers of sovereignty and surrender the rest to the newly constituted federal government; or, as in the case of the United States of America, they part with specified powers and retain the remainder. There is, however, another method whereby a unitary State may by virtue of a statute or constitution be transformed into a federal State, as was the case in Brazil and Mexico. This is the type of federation which conforms to Jellinek's definition: "a federal state is a state in which the sovereign power has by constitution divided the totality of the functions to be exercised within its sphere of power in such a manner that it reserves only a prescribed amount of those functions to be exercised by itself, and leaves the rest, without any control as to the determination of the governing principles or over the particular manner in which the functions are exercised, so long as the constitutional limitations are observed, to the non-sovereign member states which have been created by the grant to them, by the constitution, of state authority." (op. cit., p. 278). Lord Haldane is, therefore, entirely inaccurate when he states that "the meaning of a Federal Government is that a number of States come together and put certain of their powers into common custody." Secondly, he is clearly wrong when he propounds the view that the character of a federation depends on the manner and method of distribution of power. His argument is that since under the Canadian Constitution the powers of the constituent units are expressly enumerated, it does not, therefore, fall under the category of a federation. But as we have already seen, this argument is totally unsound both in theory and practice. Such a method of distribution does not vitiate the essential character of a federation that it is a State

as well as an association of States. As long as this characteristic remains unaffected, the method of distribution of powers between the federation and the federating units is of minor importance.

Federations must also be distinguished from decentralized unitary States. The component parts of a unitary State in which a system of decentralization has been adopted enjoy and exercise certain specific and definite powers of governance but always subject to the control and supervision of the central government. Under a federal constitution, on the other hand, the constituent units exercise the powers of sovereignty allotted to them, unrestricted and uncontrolled by the central government, so long as they do not transgress the limitations placed on their competence by the constitution. As the Supreme Court of Argentina has observed, "the federal form of government presupposes the co-existence of a central authority and of diverse local authorities who function within their spheres of action in full sovereignty." (Fallos 131, p. 418). The natural consequence is that "the Federal Government cannot impede or oppose the exercise by the Provinces of those powers which have not been delegated or which have been reserved." (*Banco della Provincia de Buenos Aires v. Gobierno Nacional*, Fallos 186, p. 171). This distinction has also been clearly brought out in the judgement of the Privy Council in *Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick*, (1892) A.C. at pp. 441-443. In dealing with the question of the Provinces of Canada, their Lordships observed: "The object of the British North America Act was neither to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to create a Federal Government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each Province retaining its independence and autonomy. . . . In so far as regards those matters which, by Section 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act." It is on this ground that the Union of South Africa must be classed as a unitary State and not as a federation; for, under the Union of South Africa Act, the central legislature is supreme, and can always override provincial ordinances.¹

The foregoing examination leads us to the following conclusions:

¹ *Middleberg Municipality v. Gertzen*, (1914) A.C. at p. 559. The contrary view held by certain continental jurists is not correct. See Durand, *op. cit.*, p. 5.

a federation is a State as well as an association of States, its distinctive features being (a) that the federation itself is a constitutional and international unit; and (b) that its component parts retain the character of State and exercise powers of sovereignty conferred on them by the constitution, independently of the control of the federal government. These features distinguish federations from confederations of States, on the one hand, and from unitary States, on the other.

CHAPTER II

HISTORICAL BACKGROUND OF THE INDIAN CONSTITUTION

ONE of the basic features of the Indian Republic is that it not only possesses a federal structure but is also a decentralized unitary State. Originally the Indian Federation comprised two different and distinct categories of constituent units. There were, in the first place, nine Part A States which previously formed an integral portion of the unitary State of British India and secured their autonomous status under the Government of India Act, 1935. The second category included nine Princely States or Unions of States. These did not form part of British India, nor were they within the legislative jurisdiction of the British Parliament. Their relations with the British Crown were governed by treaties, engagements and *sanads*. Part C States, which were not strictly speaking constituent units of the Indian Federation but were decentralized portions of the Indian Republic, also belonged to this category with the exception of the States of Delhi, Ajmer and Coorg which were British territories directly under the control of the Government of India. These historical differences between the two different categories of constituent units naturally led to different lines of constitutional and political development, and although under the latest amendments to the Indian Constitution, the distinction between these categories has disappeared, the differences did survive in the first stage of the federalizing process as a result of the differences in historical antecedents.

Six Periods of Constitutional Development. First Period : **Evolution of the East India Company.** The constitutional history of the first category of States which jointly made up what was known as British India falls into six distinct periods. The first began with the establishment of the East India Company as a trading corporation under Queen Elizabeth's Charter of 1600. This Charter

had three purposes in view. In the first place, it dealt with the incorporation of the Company by the name of the "Governor and Company of Merchants of London trading with the East Indies." The Company was authorized to elect annually one Governor and twenty-four committees for dealing with the various purposes for which the Company was incorporated. Secondly, the Charter granted to the Company the exclusive trading privileges for a period of fifteen years. It empowered the Company to "traffic and use the trade of merchandise by sea in and by such ways and passages already found out or which hereafter shall be found out and discovered . . . into and from the East Indies." The limits of this trading privilege were the Cape of Good Hope, on the one hand, and the Straits of Magellan, on the other. There was, however, one specific limitation on the powers of the Company in so far as it was expressly forbidden to undertake any trade in any country, port, island or place "being already in the lawful and actual possession of any such Christian Prince or State as at this present or at any time hereafter shall be in league or amity" with the Crown of England. Thirdly, the Charter also contained the germ of governmental powers inasmuch as it granted to the Company both legislative and judicial powers within prescribed limits. The Company was authorized to make and ordain such reasonable laws, constitutions, orders and ordinances as might be necessary and convenient for the good government of the Company and its settlements. It was also authorized to impose such punishments and penalties as might seem necessary or convenient for the enforcement of these laws and ordinances. The only restriction on these powers was that neither these laws nor the punishments imposed by them could be repugnant to the laws of England. The judicial powers conferred by the Charter of 1600 were enlarged by the grants of 1615 and 1623 which empowered the Company to authorize its President and other chief officers to inflict punishments for non-capital offences and to enforce martial law, subject to the submission of capital cases to the verdict of a jury.

There was a further extension of these powers in 1661. Under a charter granted by Charles II, the Company was invested with executive authority over its fortresses and settlements and also empowered to appoint Governors and other officers for their government. The judicial authority of the Governor and Council of each factory was extended to all persons belonging to the Company or under its control and to "all causes, whether civil or criminal, according to the

laws of this Kingdom". The Company was also authorized to provide the necessary arms and ammunition and to take effective measures "for the security and defence of their factories and settlement". It was also granted the extraordinary power to "make peace or war with any people that are not Christians, in any places of their trade, as shall be for the most advantage and benefit of the said Governor and Company, and of their trade." In 1678, in implementation of the judicial power granted under this Charter, a High Court consisting of the Governor and Council was established at Madras which was the principal settlement of the Company at the time. By a Charter of 1669, the port and island of Bombay, which had previously been ceded to the British Government, were granted to the East India Company to be held of the Crown, and extensive civil and military powers were conferred on the Company for the government of this territory; and in 1677 the Company was for the first time empowered to coin money.

The Charter of 1683 marked a further stage in the transformation of the Company; it conferred on the Company full power to declare war and to make peace with any Asiatic power and to raise forces for the purpose, subject to the authority of the Crown to interpose whenever considered necessary. This was followed by the Charter of 1758 which expressly conferred on the Company the power to cede, restore, or dispose of any territory acquired by conquest from any of the Princes, subject to the proviso that the Company could not, without the concurrence of the Crown, exercise these powers in respect of any territory acquired from any European State. In 1763 there was a remarkable enlargement of the authority of the Company when it secured the grant of the *diwani* of Bengal, Bihar and Orissa from the Moghul Emperor. The grant of the *diwani* introduced a system of dual government under which the fiscal administration of Bengal, Bihar and Orissa was vested in the Company which also retained full military power and authority, but the maintenance of law and order continued to be vested in the authorities appointed by the Moghul Emperor, apart from the settlements and fortresses and other possessions of the Company which were subject to the jurisdiction of the authorities created by Royal Charters.

It will be noticed that during this period the East India Company ceased to be an exclusively trading organization and acquired considerable powers of governance. The Company had full executive authority over its territorial possessions including the power to raise

forces for their defence, to acquire or cede territories, to declare war against any Prince in India and to conclude treaties with any Asiatic power. Its legislative authority over its possessions was also plenary subject to the only condition that the laws enacted by it could not be repugnant to the laws of England. There was also an organized system of judiciary whose jurisdiction extended to all its territories. Speaking of the provisions of the Royal Charters Ilbert observes: "The transition of the Company from a trading association to a territorial sovereign invested with powers of civil and military government is very apparent in these provisions." This statement regarding the legal position of the Company is not, however, correct. Important judicial decisions have held that the East India Company was not a sovereign but merely an agent or delegate of the Crown. For instance, in the *Secretary of State v. Kamachee Boyce Sahiba*, 7 M.I.A. 476, it was held by Lord Kingsdown that the property claimed by the respondent in the case had been "seized by the British Government, acting as a sovereign power, through its delegate, the East India Company." After the grant of the *diwani*, the Company acquired a dual character. It was not only a delegate of the Crown of England but was also an authority subordinate to the Moghul Emperor and exercised sovereign powers on his behalf in accordance with the laws and usages of the Empire.

Second Period : Government by the East India Company under Parliamentary Control. All power and authority which the East India Company had so far exercised in Indian territories was derived from the Crown of England, apart from the grant of the *diwani* by the Moghul Emperor; and it was not until 1767 that for the first time the British Parliament interfered in the affairs of the Company. A statute was enacted in that year which required the Company to pay to the British Government an annual sum, and in consideration of this payment the Company was allowed to retain its territorial possessions and revenues. As Ilbert points out, this was the first direct recognition by the British Parliament of the territorial acquisitions of the Company. The increasing interest which the British Parliament began to take in the affairs of the East India Company culminated in the Statute of 1773, generally known as the Regulating Act. It is necessary to examine in detail the provisions of this Statute as it laid the foundation of the future government of

¹ *The Government of India*, p. 18.

the British possessions in India. Prior to this enactment each of the three Presidencies of Bengal, Madras and Bombay was under a Governor or President and Council appointed by the Court of Directors of the East India Company. The strength of the Council varied from twelve to sixteen members. All power was vested in the President and Council jointly, and all decisions were taken by a majority of votes. The Governments of the Presidencies were independent of each other and responsible only to the Court of Directors in England. The Regulating Act introduced for the first time important provisions unifying the system of government. Section 7 of the Act declared that the whole civil and military government of the Presidency of Bengal shall be vested in the Governor-General and Council during such time as the territorial acquisitions and revenues remained in the possession of the Company. The Governor-General and Council were bound by the votes of a majority of those present at their meetings, and in the case of equality of votes the Governor-General had a casting vote. The Act also expressly declared the supremacy of Bengal over the other Presidencies. The Governor-General and Council were granted the power of superintendence and control over the government of the Presidencies of Madras and Bombay. In particular, the President and Council of Madras and Bombay were forbidden to make war or treaty without orders of the Governor-General and Council or the East India Company. They were also expressly made subject to the orders of the Governor-General and Council. A President and Council offending against these provisions could be suspended by order of the Governor-General and Council. The Presidencies were also required to transmit to the Governor-General and Council information regarding all transactions and matters relating to the government, revenues or interests of the Company.

The Act also introduced important changes in the administration of justice in the Presidency of Bengal. It authorized the Crown to establish a Supreme Court of Judicature at Fort William consisting of a Chief Justice and three other Judges. The Supreme Court was invested with civil, criminal, admiralty and ecclesiastical jurisdiction. The territorial extent of its jurisdiction covered the town of Calcutta and the factory of Fort William and the other factories subordinate to it. The jurisdiction of the Court was also declared to extend to all British subjects residing in the Kingdoms of Bengal, Bihar and Orissa, or any of them under the protection of the Company. There were,

however, two important limitations on the jurisdiction thus conferred on the Supreme Court. In the first place, the Court was not competent to take cognisance of any indictment or information against the Governor-General or any member of his Council. Secondly, the Court had no jurisdiction in respect of any suits or actions brought against any inhabitant of India residing in any of the Kingdoms of Bengal, Bihar or Orissa except on a contract where the defendant had accepted the jurisdiction of the Court. The Act also established the system of juries of British subjects resident in Calcutta in respect of all offences of which the Supreme Court had cognisance. Under Section 18 of the Act appeal lay against the judgement of the Supreme Court to the King in Council in England.

The Regulating Act also dealt with the problem of legislative authority. Under Section 36, the Governor-General and Council were empowered to make and issue such rules, ordinances and regulations for the good order and civil government of the Company's Settlement at Fort William, and the subordinate factories and places, as should be deemed just and reasonable, subject to the provision that such rules, ordinances and regulations could not be repugnant to the laws of England. Section 37 of the Act expressly reserved the power of the Crown to disallow such laws and ordinances.

Two Parliamentary Committees were appointed in 1781 to investigate matters relating to the administration of the British possessions in India, and as a result another Act was passed in 1781 defining the power of the Supreme Court. This Act expressly excluded from the jurisdiction of the Supreme Court all matters relating to the revenue regulations of the Governor-General and Council. Section 17 of the Act also conferred on the Supreme Court jurisdiction in respect of all actions and suits against all inhabitants of Calcutta "provided that their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined in the case of Mohamedans, by the laws and usages of Mohamedans, and in the case of Gentus by the laws and usages of Gentus; and where only one of the parties shall be a Mohamedan or Gentu by the laws and usages of the defendant." This was the first statutory recognition of the personal laws of the Hindus and Mohammedans, and followed the regulations which had been previously enacted by the Bengal Government.

The control thus intermittently exercised by the British Parliament was finally placed on a permanent basis by Pitt's Act of 1784,

which established a Board of six Commissioners under the designation of "the Commissioners for the affairs of India". The Board consisted of the Chancellor of the Exchequer, one of the Secretaries of State, and four other Privy Councillors appointed by the Crown. The Board was authorized "to superintend, direct, and control all acts, operations and concerns which in anywise relate to the civil or military government or revenues of the British territorial possessions in the East Indies." The Court of Directors of the Company was thus brought under the complete control of the Board. The powers vested in the Board subsequently came to be exercised by the Senior Commissioner who came to be known as the President of the Board of Control.

The Act also introduced several changes in the system of administration in India. In the first place, it reconstituted the Governor-General's Council which now consisted of three members including the Commander-in-Chief of the Company's forces in India who ranked next to the Governor-General. The Council of the other two Presidencies was similarly reorganized and included the Commander-in-Chief in the Presidencies. The Governor-General, Governors, Commanders-in-Chief and members of the Council were appointed by the Court of Directors but could be removed by the Crown. The power of the Governor-General and Council over the Presidencies of Bombay and Madras was extended to cover all matters "as relate to any transaction with the country powers, or to war or peace, or to the application of the revenues or forces of such Presidencies in time of war." The Governor-General and Council were, however, expressly made subject to the control of the Court of Directors. Thus, they could not, without the express authority of the Court of Directors, declare war, or commence hostilities, or enter into any treaty for making war, against any Prince or State except where hostilities had actually been commenced against the British Government in India.

Three important changes were subsequently introduced in this scheme of government. In the first place, the Charter Act of 1793 laid down that the junior members of the Board of Control need not be Privy Councillors. Secondly, the same Act introduced the rule that the power of the Governor-General to override the majority of his Council in exceptional cases could also be exercised by the Governors of Madras and Bombay. Thirdly, the Act of 1797 authorized the grant of a charter for the constitution of a Recorder's Court instead of the Mayor's Court at Madras and Bombay.

The next important step was taken in 1833 when another Charter Act was passed by the British Parliament. This statute introduced important changes in the Constitution of the East India Company as well as in the system of government in India. It allowed the Company to retain its territorial possessions for another period of twenty years, but they were to be held by the Company "in trust for his Majesty, his heirs and successors, for the services of the Government of India." It also completely changed the mercantile character of the Company in so far as the Company was under the statute entirely deprived of its commercial functions. It was, however, allowed to retain its administrative and political powers under the system of dual government instituted by the previous Acts. The superintendence, direction and control of the civil and military government of the British possessions in India were expressly continued to vest in the Governor-General and Council who were henceforward to be known as the Governor-General of India in Council. The statute also created a fourth member of the Governor-General's Council whose duty was confined entirely to legislative measures and who had no power to sit or vote except at meetings for enacting laws and regulations.

The statute also reorganized the legislative functions of the Government of India which were now exclusively vested in the Governor-General in Council, and the Governments of the Presidencies were only authorized to submit their legislative measures to the Governor-General in Council. The legislative authority of the Governor-General in Council extended to the repeal, amendment or alteration of any laws or regulations for the time being in force in the British possessions in India. The laws thus enacted were applicable to all persons, whether British, Indian or foreigners, and to all Courts of Justice, whether established by Royal Charter or otherwise. The territorial jurisdiction of the Council extended to all places and things within and throughout the whole of the British territories in India, and covered all servants of the Crown outside these territories but within the dominions of the Princes in alliance with the Company. The Governor-General's Council was also expressly authorized to enact articles of war for the government of the Indian Forces raised by the Company. The legislative power of the Governor-General was, however, subject to three important limitations. In the first place, it could not repeal, amend, or suspend any provisions of the Act of 1833. Secondly, it could not affect any prerogative of the Crown,

or the authority of Parliament, or the Constitution or rights of the Company, or any part of the unwritten laws or Constitution of the United Kingdom dealing with allegiance to the Crown or the sovereignty of the Crown over Indian territories. Thirdly, the statute expressly safeguarded the right of the British Parliament to legislate for the Crown's territories in India and to repeal Indian Acts. The laws enacted by the Governor-General under the powers given by this Act could also be disallowed by the Court of Directors, acting under the authority of the Board of Control.

There were three other important provisions of the Act. In the first place, it provided that "a general system of judicial establishments and police" should be inaugurated subject to such special arrangements as local circumstances may require. Secondly, it prescribed that "such laws as may be applicable in common to all classes of the inhabitants of the said territories, due regard being had to the rights, feelings, and peculiar usages of the people, should be enacted." Thirdly, it required that "all laws and customs having the force of law within the same territories should be ascertained and consolidated, and, as occasion may require, amended." The statute also authorized the Governor-General in Council to appoint a Commission to enquire into the jurisdiction, powers, and rules of the existing Courts of Justice, of existing forms of judicial procedure, and the nature and operation of laws, whether civil or criminal, written or customary. Accordingly, the first Indian Law Commission was appointed by the Governor-General, of which the most outstanding member was Macaulay; and the present Indian Codes, particularly the Indian Penal Code and the Codes of Civil and Criminal Procedure, owe their origin to this Commission. Another provision of outstanding importance was embodied in Section 87 of the Act which, for the first time, introduced the principle of equality and non-discrimination. This Section declared that "no native of the said territories, nor any natural born subject of His Majesty resident therein, shall, by reason only of his religion, place of birth, descent, colour or any of them, be disabled from holding any place, office, or employment under the Company." The substance of this provision is now to be found in Article 16 of the Indian Constitution.

The last step during this period was taken in 1853 when another Charter Act was passed by the British Parliament. This Act authorized the Court of Directors and the Board of Control to sanction the appointment of a Lieutenant-Governor of Bengal. It also

empowered the Directors of the Company to constitute one new Presidency, with the same system of a Governor and Council as in the Presidencies of Madras and Bombay or, as an alternative, to authorize the appointment of a Lieutenant-Governor. This provision was made use of in 1859 when a new Lieutenant-Governorship for the Punjab was constituted. The Act also enlarged the Governor-General's Council for legislative purposes by the addition of the Chief Justice of Bengal and one other Supreme Court Judge and four representative members from Bengal, Madras, Bombay and the North Western Provinces. The sessions of the Legislative Council were also opened to the public and their proceedings were officially published.

Third Period: Direct Government by the Crown. The system of government laid down by these statutes continued in force till 1858 when, as a result of the Indian Mutiny, the government of India was transferred to the Crown under the Government of India Act, 1858. Thus came to an end the government of the British possessions in India by the East India Company and began the period of direct government by the Crown. The Act declared that India was to be governed by and in the name of the Crown, acting through a Secretary of State, to whom were transferred the powers previously vested either in the Court of Directors or in the Board of Control. The Act also authorized the appointment of a fifth principal Secretary of State for this purpose. It also constituted a Council of fifteen members to assist the Secretary of State; of these eight were appointed by the Crown and seven elected by the Directors of the Company. The Secretary of State was the President of the Council, but had power to override in cases of difference of opinion, and to issue any dispatches without reference to the Council. The Board of Control was thus abolished, and the Secretary of State in Council was given a quasi-corporate character for the purpose of enabling him to claim the rights and discharge the obligations devolving upon him as successor to the East India Company. In consequence of the abolition of the East India Company, the property of the Company was transferred to the Crown and the expenditure of the revenues of India was placed under the Secretary of State in Council. The Act also transferred to the service of the Crown all naval and military forces of the Company, although they continued to retain their separate local character, with the same liability to local service and the same pay and privileges. The changes introduced by the Government of India Act, 1858, were formally announced in India by a Royal Proclamation, and this was

the first time that a constitutional document of this character was used in India.

This important change in the administration of the British possessions in India was supplemented by the Indian Councils Act, 1861, which reconstituted the Governor-General's Executive Council as well as the Legislative Council. The Executive Council was reorganized to consist of three members who had served for ten years in India under the Company or the Crown, one barrister or advocate of five years' standing, and the Commander-in-Chief as an extraordinary member. Legislative authority was vested in the Governor-General's Council strengthened by not less than six and not more than twelve additional members nominated by the Governor-General for a period of two years. Of these additional members, not less than half were persons not in the civil or military service of the Crown. The function of the Legislative Council was, however, strictly limited to legislation, and it was expressly forbidden to transact any business other than the consideration and enactment of legislative measures. Nor was it permissible to introduce in the Council, without the previous sanction of the Governor-General, any measure relating to the public revenue or debt, religion, military or naval affairs, or foreign relations. Every measure passed by the Council required the assent of the Governor-General, subject to the power of the Crown to disallow any Act.

The legislative authority of the Governor-General in Council extended to making laws and regulations or altering any laws and regulations for the time being in force in the British territories in India, and to making laws and regulations for all persons and for all Courts of Justice, and for all places and things within the said territories. It also covered the servants of the Government of India within the dominion of Princes in alliance with the Crown. There was, however, an express provision saving the general authority of the British Parliament. It is interesting to note that the Act conferred on the Governor-General exceptional power to make, in cases of emergency, ordinances without the concurrence of his Council which were to remain in force for a period of six months. The power now vested in the President of the Indian Republic to issue emergency ordinances may be traced back to this provision. The Act of 1861 also restored to the Governors of Madras and Bombay the power of legislation which had been taken away from them under the Charter Act of 1833. The Governor's Councils of Madras and Bombay were enlarged for the purpose

of legislation by the addition of the Advocate-General and other members nominated on the same basis as the additional members of the Governor-General's Council. No demarcation was, however, made between the extent of the legislative power of the Governor-General's Council and that of the Governor's Councils; but all Acts of the local legislature required the assent of the Governor-General over and above the assent of the Governor. They were also subject to the right of disallowance vested in the Crown as in the case of the Acts of the Governor-General's Council.

The statute also dealt with the organization of legislative authorities in the new territorial acquisitions. Under Section 44, the Governor-General was directed to constitute, by proclamation, a Legislative Council for Bengal. He was also authorized to establish similar Councils for the North Western Provinces (afterwards known as the United Provinces) and for the Punjab. These Councils were to consist of the Lieutenant-Governor and a number of nominated members, and were governed by the same provisions as the Legislative Councils for Madras and Bombay. The Act also conferred on the Governor-General power to establish new Provinces for legislative purposes and to appoint new Lieutenant-Governors, and to alter the boundaries of the existing Provinces.

In the same year another Act was passed by the British Parliament reorganizing the judicial administration. This Act empowered the Crown to establish, by letters patent, High Courts of Judicature in Calcutta, Madras and Bombay, and on their establishment the chartered Supreme Court and the *Sadr Adalat* Courts were abolished and their jurisdiction and powers transferred to the new courts. Each of the High Courts consisted of a Chief Justice and not more than fifteen judges of whom not less than one-third including the Chief Justice, were barristers, and not less than one-third were members of the Civil Service. All judges were appointed by the Crown and held office during its pleasure. The High Courts were expressly invested with the powers of superintendence and control over all courts subject to their jurisdiction.

Three changes of considerable importance were subsequently introduced by parliamentary legislation. The Government of India Act, 1865, conferred on the Governor-General's Council the power to legislate in respect of all British subjects in Indian States, whether servants of the Crown or not, as well as the power to define and alter the territorial limits of the various Presidencies and other Provinces. In

1869, another statute was enacted empowering the Governor-General's Council to make laws for all Indian subjects of the Crown in any part of the world, whether in India or elsewhere. The Indian Councils Act, 1892, increased the strength of the Legislative Councils, and authorized the Governor-General to make rules, with the approval of the Secretary of State in Council, regulating the conditions under which the members of the Legislative Councils were to be nominated. It also authorized the Governor-General in Council to make rules regarding the discussion of the annual financial statement as well as interpellations under specified conditions and restrictions.

Fourth Period: The Beginning of Representative Legislature. The system of governance prescribed by these British statutes continued to be operative until 1909 when, for the first time, the principle of election was introduced under the Indian Councils Act, 1909. This statute marks the beginning of the gradual democratization of the machinery of governance in India. In accordance with the regulations issued under the authority of this Act, as amended by the regulations of 1912, there was an official majority in the Governor-General's Council, and a non-official majority in all other Legislative Councils. The Indian Legislative Council consisted of thirty-six officials and thirty-two non-officials; in the Legislative Council of Bengal there were nineteen officials and thirty-two non-officials; in Madras twenty officials and twenty-six non-officials, and in Bombay, eighteen officials and twenty-eight non-officials. There was a similar majority of non-officials in the Legislative Councils of the United Provinces, Bihar and Orissa, Punjab, Burma and Assam. The non-official members of the Indian Legislative Council were elected by the Provincial Legislative Councils and special electoral bodies such as Chambers of Commerce and landholders. The rules also provided for the special representation of Mohammedans and Mohammedan landholders; and this was indeed the beginning of the communal electorates which have played such an important role in the political development of India. In the Provinces, the main electoral bodies were Municipal Corporations and Municipalities, the Universities, Chambers of Commerce, and Mohammedans. The rules, it would, therefore, be clear, provided for indirect election and there was no provision for direct election by the people.

The powers of the Legislative Councils continued to be the same as under the Act of 1861, but their deliberative functions were subsequently enlarged. The Act of 1892 had empowered the Governor-

General as well as the Governors and Lieutenant-Governors of the Provinces to make rules authorizing the discussion of the annual financial statement. The Act of 1909 repealed these provisions of the Act of 1892 and prescribed the making of rules authorizing the discussion of the annual financial statement and of any matter of general public interest. The rules made under this statutory provision granted to the members of the Legislative Councils for the first time the right to propose resolutions in respect of the budget or any matter of general public importance and to divide the Councils upon them. It was, however, made clear that the resolutions were purely recommendatory and not binding on the Governors. There were at the same time several important restrictions on this right. As regards the financial statement, some of the items of revenue as well as of expenditure were expressly excluded from discussion. This was the origin of the distinction which has now been embodied in the Indian Constitution between votable and non-votable subjects, i.e. the expenditure charged upon the Consolidated Fund of India and the expenditure not so charged. The rules also excluded from discussion any matter affecting the relations of His Majesty's Government or of the Government of India with any foreign or Indian State and any matter under adjudication by a court of law having jurisdiction in any part of the British Dominions. There was a further reservation that the Governor-General had the right to disallow any resolution without giving any reason other than that in his opinion it was not consistent with the public interest to do so. The same authority was also vested in the Governors and Lieutenant-Governors of the Provinces. The Act of 1909 also enlarged the scope of interpellations. The regulations made under the Act of 1892 had granted to the members of the Legislative Councils the right to ask questions under certain conditions and restrictions. This right was now extended to supplementary questions for the purpose of elucidating any matter of fact regarding which a request for information had been made in the original question.

Fifth Period: Dyarchical Form of Government. The system of government envisaged in the Act of 1909 continued to be in force till the Parliamentary Statute of 1919 which began a new period in the history of the constitutional development of British India. Several far-reaching changes were introduced by and under the provisions of the statute. In the first place, a clear distinction was now made between provincial and central powers, although both the executive

and the legislative authority of the Provinces remained subject to the control of the Central Government. Thus, although the Provinces now had clearly defined powers, they could be overridden under the authority of the Governor-General. Secondly, within the powers conferred on the Provinces, there was a clear-cut division between reserve subjects and transferred subjects. The reserve subjects included all those matters in respect of which the Governor had discretionary authority. They were not, therefore, subject to the control of the Provincial Legislature. As regards transferred subjects, elected members of the Legislative Council were appointed members of the Governor's Executive Council and were placed in charge of these subjects, and were, therefore, under the control of the legislature. The system thus introduced in the Provinces was known as dyarchy because of the division of the power and authority of the Governor into two separate classes, one being entirely at the discretion of the Governor and the other subject to the control of the legislature. The report of the Simon Commission thus describes this new system of government: "The theory of the reformed constitution is that ministers without being answerable for reserve departments or for policy with the reserved side are jointly responsible to the elected legislature in respect of the transferred half of the Government. But it seems to us that it has proved impossible to translate this theory into practice. The intention of dyarchy was to establish within a definite range responsibility to an elected legislature. In the light of experience, it may be doubted whether the object aimed at could be attained as long as both halves of Government have to present themselves before the same legislature. The practical difficulty in the way of achieving the objective of dyarchy and obtaining a clear demarcation of responsibility arises not so much in the inner counsels of Government as in the eyes of the legislature, the electorate and the people." The system of dyarchy, in spite of all its weaknesses, was however, the first step towards the establishment of responsible government in the Provinces and was also in accordance with the objective set forth in the famous declaration made by the British Government in 1917. This defined the policy of His Majesty's Government in the following terms: "The policy of His Majesty's Government with which the Government of India are in complete accord, is that of increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to the progressive realization of

responsible government in India as an integral part of the British Empire."

Sixth Period : The Birth of Responsible Government. We have already seen that the Regulating Act of 1773 laid the foundation of an elaborate system of administration of the British possessions in India. The Charter Act of 1833 further elaborated the machinery of administration and established a unified system of government in British India. The Government of India Act, 1858, terminated the administration of the East India Company and transferred it to the Crown. The Indian Councils Act of 1861 introduced for the first time the system of representative institutions, and this was further extended by the Act of 1909. The next important development was initiated by the Act of 1919 which laid the foundation of responsible government. The authors of the Montague-Chelmsford Report had thus described their view of the future constitution of India: "Our conception of the eventual future of India is a sisterhood of States self-governing in all matters of purely local or provincial interest. Over these congeries of States would preside a Central Government increasingly representative of and responsible to the people of all of them; dealing with matters both internal and external of common interest to the whole of India; acting as arbitrator in inter-State relations and representing the interests of all India on equal terms with the self-governing units of British India." This concept of the constitutional organization of India was given a practical shape and form in the Government of India Act, 1935, which terminated the period of dyarchy and began the period of responsible government in the Provinces.

The first object of the statute was to establish an All-India Federation consisting of the Governor's Provinces and the Indian States which acceded to the Federation. It was for the first time that the Indian States, which were not subject to the sovereignty of the British Parliament, were to be brought into a constitutional organization having authority throughout the territories of the Provinces and the acceding States. Secondly, for the purpose of establishing the All-India Federation, the statute split up the unitary State of British India into several autonomous Provinces, independent within their own sphere and free of central control, deriving their authority directly from the Crown. This was indeed a radical departure from the constitutional scheme under the Act of 1919. Thirdly, the statute also established a Federal Court having authority throughout the

Federation and exercising appellate jurisdiction over all High Courts in British India.

The provisions of the statute relating to the Provinces came into operation on the 1st of April, 1937, and the Provinces became autonomous and independent within the sphere assigned to them. Each of the Governor's Provinces possessed an Executive and a Legislature invested with exclusive authority in a clearly demarcated sphere; and within that sphere the Executive Government was responsible to the Legislature, subject to the specified discretionary powers of the Governor.

The Government of India Act, 1935, had expressly laid down that the Federation of India, as embodied in the Act, could not come into existence unless the Indian States entitled to choose not less than fifty-two members of the Council of State had executed the Instrument of Accession and unless the aggregate population of the federating States amounted to not less than one-half of the total population of the States. The negotiations between the Government of India and the Indian States in regard to their accession were broken off by the Government of India soon after the commencement of the second World War. This was indeed unfortunate as the absence of responsible and representative government at the Centre ultimately led to the partition of India and the tragic events which followed it. An eminent statesman has thus commented on the situation: "For India as a whole the failure of Federation was a disaster. So bitter indeed was the antagonism prevailing between the two main communities that it was bound to be a matter of the utmost delicacy to devise any constitution acceptable to both. The Hindus must naturally favour rule by simple majorities, since they had the numerical advantage. But this must be fatal for the Muslims, since majority rule would spell for the Muslims permanent exclusion from power, and lead them to demand some special franchise and other arrangements to protect Muslim interests. These in turn were bound to arouse the strenuous resistance of Hindus, and so the deadlock of claims would stand, menacing and irreconcilable. At any moment the combustible material might burst into flames. Immediately the communal issue dominated everything. Riots and killings left their ugly trail of anger and determination to have revenge. Thus all the time this evil thing was bedevilling the relations between the two great communities and paralysing the hopes of peaceful and harmonious progress. To such an impasse the Princes might conceivably

have applied a balancing element, which under a carefully devised scheme could have averted the division of the country, for partition was almost certainly the only alternative should the federal scheme come to nothing.”¹ The failure of the federal scheme may be attributed to two causes. In the first place, the policy of the Government of India in respect of the accession of the States to the Indian Federation was inelastic and inflexible. If a certain amount of comprehension of the reality of the situation had been shown by them, there is no doubt that it might have been possible to secure the accession of the majority of the States. Further, in regard to certain specified matters, the Government of India went so far as to disregard the understandings which had already been reached at the Round Table Conferences. Secondly, the failure of the negotiations was also due to the growing opposition to the federal scheme amongst the Indian Princes led by the Rulers of Hyderabad, Bikaner and Nawanagar. The federal provisions of the Act, therefore, remained in abeyance. The Act had, however, provided for a transitional period between the establishment of provincial autonomy and the commencement of the Federation. Under these provisions the Central Legislature, as established under the Act of 1919, continued to function as the Federal Legislature for British India; but the executive government at the Centre continued to be the same as under the Act of 1919. There was, therefore, no representative and responsible government at the Centre. The only change made in the system of Indian government was, therefore, the setting up of provincial autonomy under which the provincial governments became responsible governments within the sphere assigned to them by the Government of India Act, 1935. It should, however, be noted that during this period the Federal Court, the Federal Public Service Commission and the Federal Railway Authority began to function under the Act, although the Federation, as embodied in the Act, was not established. It is, therefore, obvious that British India was no longer a unitary State as under the Act of 1919, but had already split up into autonomous units which functioned within the sphere allotted to them, independently and without being subject to the control of the Central Government.

The Indian Independence Act, 1947. This state of affairs continued till the enactment by the British Parliament of the Indian

¹ Lord Halifax, *Fullness of Days*, pp. 125-126.

Independence Act, 1947, which has had far-reaching and radical effects on the political and constitutional development of India as a whole. In the first place, the Act established two separate and independent Dominions in the territories of British India. Secondly, the Act terminated British authority in India. Section 7 of the Act expressly stated that His Majesty's Government in the United Kingdom shall have no responsibility as respects the government of any of the territories which were included in British India. It also made clear that after the 14th August, 1947, His Majesty's Government in the United Kingdom shall not have any form of control over the affairs of the Dominions of India and Pakistan or of any Province or part thereof. Thirdly, the Act authorized the two new Dominions to set up any kind of constitution that they desired including the right to secede from the Commonwealth. It also granted to the legislatures of the two Dominions full power to make laws including laws having extra-territorial operation. The Act also provided that no statute of the British Parliament shall extend to either of the Dominions unless it is extended thereto by a law of the Dominion Legislature. Fourthly, the Independence Statute terminated by a unilateral declaration the treaties, engagements and *sanads* which had so far governed the relations between the Crown and the Indian States. In other words, the paramountcy so far claimed by the Crown by virtue of treaty, grant or otherwise came to an end, and, on its termination, the rights exercised by the Crown in regard to the States were not transferred to the Governments of the two new Dominions but reverted to the States.

Political Development of the Princely States. As we have already seen, the Republic of India comprises the territories which formerly constituted the British Dominions in India as well as the territories of the Princely States which were outside the jurisdiction of the British Crown and the British Parliament. We have so far examined the constitutional development of the territories known as British India. It now remains to trace very briefly the political evolution of the Princely States. Historically speaking, the States fell into seven different classes at the time of the commencement of their relations with the East India Company. In the first place, there were States which were sovereign and independent *de jure* and *de facto* owing no allegiance to the Moghul Emperor. Such, for instance, were the States of Gwalior and Indore. As regards Hyderabad, it is clear that the State originally enjoyed a status and position superior

to that of the East India Company. Secondly, there were States which were dependent *de jure* but sovereign *de facto*, as, for example, the States of Tonk and Jaora which owed nominal allegiance to the Ruler of Indore. The third class included the States which had lost their independence and separate existence for a period but were restored to their former status and rights by the British Government. Fourthly, there were States which owed their separate and individual existence to the British Government. These were created either out of British territory or by dismemberment of other States. The fifth class included all States which paid tribute to other States. Apart from the payment of tribute, they enjoyed full and complete sovereignty, whether internal or external. The next group consisted of States which were subordinate *de jure* and *de facto* to other States. This class also included States which were directly under the authority of the Moghul Emperor. Finally, there were States which subsequently came to be known as mediatized and guaranteed States on whose behalf the East India Company intervened so as to secure their separate existence. This detailed classification of States clearly shows that it is not correct to assume that all States were under the suzerainty of the Moghul Emperor at the time of the British advent in India. On the contrary, many of the States had no political relations with the Court of Delhi and had established their independence in defiance of the authority of the Moghul Emperor.¹

The first period in the history of the relations between the States and the East India Company was one during which the States dealt with the Company on a footing of equality. It should be remembered in this connexion that from 1765 the East India Company was an agent of the Moghul Emperor and its position was not, therefore, superior to that of the States which accepted the suzerainty of the Moghul Emperor. On the other hand, as we have already seen, there were many States which did not accept the supremacy of the Court of Delhi. In fact, in its dealings with the Rulers of Hyderabad, the Company on many occasions behaved as if it were occupying an inferior position. The second period was marked by the definite supremacy of the East India Company acting on behalf of the British Crown. Many of the treaties which were concluded during this period were, therefore, treaties of subordinate alliance and co-operation. A striking instance is furnished by the treaties which were

¹ See Sen, *op. cit.*, Chap. I.

concluded during the first decade of the nineteenth century with the Rulers of the States of Rajputana. The third period began after the Crown had taken over the government of the British possessions in India. In the Royal Proclamation issued at that time it was announced that the treaties concluded with the States by the East India Company were binding on the Crown and as such would be considered as inviolate and inviolable. It was during this period that the ascendancy of the Crown was clearly and unmistakably established throughout India and the doctrine of paramountcy of the Crown was evolved to justify the action of the agents of the Crown in derogation of the treaties concluded with the States. The rights which were specifically claimed on behalf of the Crown related to intervention in the affairs of the States in the event of gross misrule and maladministration and the consequential powers which the Crown and its agents could exercise within the territories of the States, although they continued to remain outside the legislative authority of the British Parliament. This continued to be the position of the States till the Indian Independence Act of 1947 which terminated the authority of the Crown exercisable in the territories of the States and expressly provided that the powers hitherto exercised by the Crown would revert to the States. But before the provisions of the statute became operative, the Indian States executed Instruments of Accession under which they transferred all powers of governance to the new Dominion of India in respect of specified matters and subject to the terms and conditions laid down in the Instrument. Thus, for the first time, the Indian States became an integral part of the constitutional machinery established for the new Dominion of India under an amended version of the Government of India Act, 1935. This, however, was a transitory stage. Many of the States were soon afterwards persuaded to execute additional agreements merging their territories in the neighbouring Provinces of the Indian Dominion. This, then, was the position of the States when in 1950 the Indian Constitution, framed by the Constituent Assembly, came into operation.

CHAPTER III

NATURE OF THE INDIAN POLITY

The People and the Constitution. The constitution of a State is not a bed of Procrustes which demands psychic or physical adjustment of the people. On the contrary, it is the constitution which must be moulded by the genius of the soil; it is the constitution which must reflect the *ethos* of the people. It is sometimes argued but may be regarded as an exploded myth that a particular type of constitution is intrinsically sound and must, therefore, be accepted by every civilized State. We may consider democracy to be the ideal form of government, but this does not necessarily mean that a nation which has no aptitude for the smooth and successful working of a democratic constitution should and must adopt a democratic pattern of organization. The democratic character of a constitution is one thing, its practical value is a totally different matter. As Orlando, the Italian jurist, has rightly pointed out, "there can be no optimum form of government; a form of government which is good for a particular people at a particular stage of civilization is not necessarily good for another people at a different stage of civilization."¹ A particular form of constitution which is successful in one State may prove to be a total failure in a different political climate. A typical illustration of this is furnished by the Constitutions of the Latin American States. Freed from the yoke of the Spanish and Portuguese Empires, most of these States adopted the constitutional pattern which had proved such a great success in the United States of America. In the actual working of these Constitutions, however, the results have been totally different. In most cases the presidential regime embodied in the constitution has led to a monocratic dictatorship owing to the subservience of the legislature. Successions of *coups d'état*, revolutions and undiluted autocracy have been their normal political

¹ *Principii di diritto costituzionale*, p. 63.

events just as general elections are in other democratic countries. The working of the American Constitution has also clearly shown that there must be close and intimate relation between the constitution and the temperament and tradition of the people. As Bryce has pertinently remarked, nearly every provision of the American Constitution that has worked well is one borrowed from or suggested by the Constitution of some of the American States; and nearly every provision that has worked badly is one which the Convention, for want of a precedent, was obliged to devise for itself.¹

The Indian Constitution must, therefore, be examined in the light of this historical truth. It will be noticed that its main framework is modelled on the pattern of the Government of India Act, 1935. This was no doubt natural and inevitable, since a complete hiatus between the past and the present would have been politically unwise and inexpedient. Thus, we find that more than one hundred Articles of the Constitution are substantial or verbatim reproductions of the provisions of the Government of India Act, 1935. These Articles cover a wide range of important subjects such as the internal organization and procedure of the Union and State Legislatures, the legislative powers of the President of the Republic and the Governors of the States, the Union and State Judiciary, and the administrative relations between the Union and the States. Moreover, some of the basic principles of the provisions of the Constitution dealing with the distribution of legislative powers, and finance and property are borrowed from the Government of India Act, 1935. It would, therefore, be evident that the Indian Constitution is not entirely an innovation but has its roots deep in the past.

On the other hand, there is nothing in the Constitution which can be taken as a typical product of the Indian mind. For instance, one would have expected that at least the provisions relating to the States would prescribe that the system of *panchayats* would be part and parcel of the constitutional machinery. It would have been more in harmony with the temperament and tradition of the people of India if the Constituent Assembly had devised a kind of sovietisation of the entire machinery of governance founded upon the system of village republics which had for centuries been the mainspring of the political life of India. But all that the Constitution has done is to lay down a "directive" that "the State shall take steps to organize village

¹ *The American Commonwealth*, Vol. I., Chap. III.

panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government." It is, therefore, obvious that in several particulars the Constitution lacks the spirit of reality, and here lurks the danger of disruptive forces, because it must be admitted that an apparatus of government divorced from the realities of the environment might not prove to be a stable and lasting solution of the political problems. However, despite this deficiency the Indian Constitution has already achieved a fair measure of success, and this may be attributed to two important factors. In the first place, in consequence of the mass movement under Mahatma Gandhi's leadership, the people of India have become conscious of their political power and, as the recent elections have shown, are ready to make use of their political rights in their own interests. Secondly, more than a hundred years of British rule have inculcated in the minds of the *intelligentsia* a feeling of national pride and independence.

The success of the Indian Constitution may be contrasted with the total failure of the monarchical Constitution of Egypt which was based on the Constitution of Belgium. From a theoretical point of view, the Egyptian Constitution was the embodiment of parliamentary democracy, but in actual practice it was marred by the excessive power and authority of the King. The failure of the Egyptian Constitution was primarily due to the total absence of popular movement and the vesting of political power in a small class of rich merchants and landowners who were subservient to royal authority.

Equally deplorable has been the recent subversion of the Constitution in Pakistan. The question naturally arises: why has democracy failed in Pakistan but achieved a fair measure of success in India when the historical antecedents and the socio-political conditions of the two countries are almost identical. The reasons are not far to seek. In the first place, Pakistan has in recent years suffered from a total lack of sound and wise political leadership capable of enlisting the support of the majority of the people. The premature demise of the first Head of State and the tragic assassination of the first Prime Minister had left a vacuum in the political arena which could not be filled by a leader of political wisdom and integrity. Secondly, after the death of the first Prime Minister, there was no disciplined and organized political party; and the existence of strong political parties is an indispensable condition for the successful working of parliamentary

democracy.¹ Thirdly, it must be pointed out that the fault did not lie with the electorate as no general elections were held and no opportunity was thus given to the people of Pakistan to elect a stable government. Fourthly, the President of the Republic in the last resort adopted the extraordinary procedure of invoking the aid of the armed forces instead of following the normal course under the Constitution of appealing to the electorate. India, on the other hand, has been exceptionally fortunate in her leadership and the success of her Constitution has been due in no small measure to the political sagacity and integrity of her first Prime Minister. India has also had the essential requirements of parliamentary democracy: a well-organized and well-disciplined party and a strong opposition. As long as these conditions continue to exist, it may safely be hazarded that there will be no danger to parliamentary democracy in India.

Synthetic Democracy of the Indian Constitution. The preamble to the Constitution describes India as "a sovereign democratic Republic". This description predicates three different concepts. In the first place, it postulates that India is a sovereign and independent State. This statement merely confirms the provisions of the Indian Independence Act, 1947, which was passed by the British Parliament before the partition of India into two Dominions. Section 1 of the Act declared that "as from the fifteenth day of August, 1947, two independent Dominions shall be set up in India, to be known respectively as India and Pakistan." Section 7 further provided that "as from the appointed day His Majesty's Government have no responsibility as respects the government of any of the territories which, immediately before that date, were included in British India." The Act also conferred on the Legislature of each of the new Dominions full power to make laws for that Dominion, including laws having extra-territorial operation. These provisions of the British Statute make it quite clear that India became an independent Dominion on the fifteenth of August, 1947. But the Constitution has gone still further. The Indian Independence Act had continued the constitutional relationship between the Crown of England and the Dominion of India by providing that the Governor-General of India shall be appointed by the Crown and shall represent His Majesty for the purposes of the government of the Dominion. This constitutional

¹ See Veyssiet, *De la nécessité des partis organisés indépendants parlementaires*, Chap. I., where the author cites with approval Sir Winston Churchill's observation on the working of parliamentary democracy on the continent of Europe: "They have copied the motor car but have forgotten the brakes. The result is not, therefore, surprising."

relationship has disappeared under the Indian Constitution, and India has become completely independent and sovereign.

The second concept is that India is a democratic State. As we have already seen, two fundamental principles flow from the concept of democracy. The first is that India is governed by her people, i.e. by the representatives of the people elected on a universal franchise. This principle is the foundation of the system of governance incorporated in the Constitution. Secondly, democracy implies the preservation and maintenance of individual rights. A complete and elaborate catalogue of individual rights has, therefore, been embodied in the Constitution, and provisions have also been made for their adequate protection by means of constitutional remedies. The full measure of recognition which has been accorded to these two principles in the Indian Constitution is the hall-mark of its democratic character, but modern democracies, as we have discussed in Chapter I, are of three distinct and different types. There is, in the first place, the system of presidential regime, the prototype of which is furnished by the United States of America. The essential characteristic of this type of democracy is that the Head of State, who is elected by the people and in whom the entire executive authority of the State is vested, is not responsible to the legislature. Secondly, there is the directorial form of government which is to be found in the Swiss Confederation. The main feature of this form of democracy is a collegiate executive elected by the legislature for a fixed period but not responsible to the legislature. The third type of democracy is the system of responsible government, the classical example of which is to be found in the United Kingdom. The essential element of this form of democracy is that the executive is responsible to the legislature.

An examination of the provisions of the Indian Constitution clearly shows that the pattern of political organization embodied in it does not come under any one of these categories of democracy; on the contrary, it appears to be a hybrid product, a curious mixture of the essential elements of the system of responsible government and of the presidential regime. The Constitution expressly provides that the Council of Ministers of the Union as well as of the States shall be collectively responsible to the legislature. It is, however, somewhat curious that contrary to all constitutional precepts and practice, there is no provision for the individual responsibility of ministers. On the other hand, the Constitution also provides that there shall be a President of India elected by the members of an electoral college consisting

of the elected members of the Union Parliament and the elected members of the Legislative Assemblies of the States. The executive power of the Republic is vested in the President and is to be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. It is also made clear that the primary function of the Council of Ministers is "to aid and advise the President" in the discharge of his responsibilities. There is a further provision that the ministers are appointed by the President, and hold office during his pleasure. Extensive powers have also been conferred on the President in the event of an emergency. The most striking feature of all these provisions is that they do not contain any limitation on the exercise of the constitutional powers by the President.¹ Under the Irish Constitution, the powers conferred on the President of Eire are much more limited; nevertheless, there is a specific provision that "the powers and functions conferred on the President by this constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this constitution that he shall act in his absolute discretion." The Indian Constitution does not, however, impose any such restriction on the authority of the President. On the other hand, the Constitution expressly provides that all executive action shall be expressed to be taken in the name of the President but does not lay down that every such act must be authenticated by the signature of a responsible minister, as is the invariable practice in all systems of parliamentary democracy. On the contrary, clause (2) of Article 77 leaves the matter entirely in the hands of the President. It would, therefore, appear that, according to the text of the Constitution, the President of India has the authority of a resurrected Viceroy. This kind of synthetic democracy is practically without parallel in the constitutional history of the world. The only prototype was to be found in the Weimar Constitution of Germany. The Constitution of the Second Republic of Spain also furnished a similar pattern.

It may be pointed out that these provisions relating to the powers of the President are largely borrowed from the Constitutions of the British Dominions. There is, however, a fundamental point of difference between these Constitutions and the Constitution of the Indian Republic. Under the constitutional system of the British Common-

¹ The view expressed by the High Court of Andhra Pradesh regarding the meaning of the words "to aid and advise" in *In re Jayasimha Iyer*, A.I.R. (1958) Andh. 643, does not contradict this interpretation.

wealth, the provisions of a written constitution are subject to the restrictions and reservations imposed by constitutional usages and conventions. For instance, a Bill enacted by the Parliament of Australia is subject to the assent of the Crown but in actual practice, as a result of constitutional conventions, the Crown has no power to withhold assent. But this cannot be the position in India since no constitutional usages have yet been established. It would accordingly be evident that in interpreting the provisions of the Constitution in respect of the powers of the President, the text of the Constitution must be construed by itself without importing any extraneous theory or principle.

It may, however, be argued on the analogy of the Swedish Constitution that these express powers of the President may be modified by constitutional practice. Article 4 of the *Regeringsform* of Sweden laid down that "the King alone shall govern the kingdom in the manner prescribed by the present Constitution; he shall, however, in the cases specified, take the advice and counsel of the Council of State, to which the King shall summon and appoint capable, experienced and honest men of good reputation. . . ." But the advice tendered to the King by the Council of State was not binding on him. In spite of these clear and emphatic provisions of the Constitution, the system of responsible government has gradually been introduced since the first World War, and today, as a result of constitutional practice, the text of the Constitution has been entirely modified. It may, therefore, be reasonably contended that a similar practice might grow up in India and thus modify the actual text of the Constitution.

Pseudo-Republicanism of the Constitution. The preamble to the Constitution also describes India as a Republic. The term does not, however, possess any definite connotation. In the United States of America the term has been construed to mean a government "in which the powers of sovereignty are vested in the people and are exercised by the people through representatives chosen by them, to whom those powers are specially delegated." It has also been judicially laid down that "in a republic all the citizens, as such, are equal, and no one can rightfully exercise authority over another but by virtue of power constitutionally given by the whole community."² This

¹ Fahlbeck, *Die Regierungsform Schwedens*, p. 35; Amati, *Le costituzioni della svezia e della Norvegia*, pp. 43-44.

² Black, *Constitutional Law*, pp. 295-297.

definition does not, however, carry us very far as it means that a republican form of government is nothing more or nothing less than a democratic government. Nor is this definition historically true, for the term "republic" had its origin in opposition to hereditary monarchy, and sometimes a republican form of government was an oligarchy or an aristocracy, as, for instance, in the Italian Republics of the Middle Ages. In modern times the term has been used to indicate an ultra-radical form of democracy in which the sovereignty of the people is given due weight and recognition. In the Indian Constitution, however, there is nothing which is strikingly republican in character. It is the usual practice to provide in a republican constitution the well-known formula that "sovereignty emanates from the people," as, for instance, in the Republican Constitution of Turkey and the Federal Constitution of Argentina. There is, however, no such provision in the Indian Constitution, although the Objective Resolution passed by the Constituent Assembly did contain the formula. Further, the constitution of a strictly republican character generally provides that the Head of State shall be elected by direct, universal suffrage. Thus, Article 81 of the Constitution of Brazil specifically states that "the President and the Vice-President of the Republic shall be elected by the direct suffrage of the nation and by absolute majority of votes." A similar provision is to be found in the Mexican Constitution of 1917. The same provision appears in most of the republican constitutions of Europe. For instance, Article 41 of the Weimar Constitution provided that "the President of the Reich is elected by the entire German people." There was a similar provision in the now defunct Constitution of the Spanish Republic. The Constitution of India differs from these republican constitutions on this important point. Moreover, most of the republican constitutions contain such constitutional devices as plebiscitary legislation by means of popular referendum and initiative. The Swiss Confederation offers a remarkable illustration of this practice. The Weimar Constitution of Germany also contained several provisions of this character. Under that constitution, the people of the German Reich had the last word in matters relating to finances and legislation, whether constitutional or otherwise, as well as in respect of the election of the President. There are no such provisions in the Indian Constitution; and it is from the point of view of these positive rules of constitutional practice that the Indian Constitution may be characterized as pseudo-republican. On the other

hand, it must be admitted that the term "republic" has no clear and generally accepted significance, and may mean different things in different constitutions. For instance, it has been argued that under the Argentine Constitution the term "republic" connotes: (a) the absence of any kind of hereditary functionary; (b) the responsibility of all public authorities; (c) strict application of the principle of separation of powers; and (d) equality of all citizens before the law.¹ Further, many publicists have, on the strength of precedents, gone so far as to assert that the term does not necessarily signify an anti-monarchical system of government. The Weimar Constitution of Germany contained the following formula: "The German Empire is a Republic." Professor Larnaude² of the University of Paris describes this as "a strange coupling of words which are antithetical in character." According to Esmein, however, a number of illustrations in support of this contention can be found in the Constitutions of the First and Second Empires of France. He cites the *senatus-consultus* of the 28th Floreal of the twelfth year which represented imperial dignity as a sort of republican magistracy. Article 1 of this Constitution thus clarified the position: "The government of the *republic* is entrusted to an *emperor* who takes the title of the Emperor of France." The Constitution of the 15th of January, 1852, although republican in name, was also of the same pattern. Similarly, the *senatus-consultus* of the 7th November, 1852, superimposed on the republican constitution of France the institution of a hereditary emperor. The last constitution of the Second Empire contained similar provisions. Esmein, therefore, concludes that these instances clearly indicate that the principle of republicanism is not necessarily incompatible with the doctrine of Caesarism.³

The following conclusions may, therefore, be drawn from the foregoing discussion. First, the term "republic" is not a term of constitutional law and has no definite content or meaning. Second, the term appears only in the preamble to the Constitution and is not to be found anywhere in any of its operative provisions. Third, under the Indian Constitution, the term does not signify anything more than that the Head of the Indian Republic does not hold a hereditary office.⁴ The term "republic" used in the Italian Constitution of 1948 has been similarly interpreted. Esposito, for instance, contends that

¹ Roussy, *La constitution de la république argentine*, p. 142.

² Dulsois, *La constitution de l'empire allemande*, p. 2.

³ *Droit constitutionnel*, Vol. I., p. 325.

⁴ This corresponds to Jellinek's concept of *Republik als Nicht-monarchie*.

"the elective character of the Head of State follows immediately from the declaration that Italy is a republic."¹

Federalism of the Indian Constitution. It has already been indicated that the main feature of the Indian Constitution is its federalism, although the term "federation" is not to be found anywhere in the Constitution which describes the structure of the Indian Republic as "a Union of States". The Chairman of the Drafting Committee of the Constituent Assembly made the following observation on this question: "It will be noticed that the Committee has used the term 'Union' instead of 'federation'. Nothing much turns on the name, but the Committee has preferred to follow the language of the preamble to the British North America Act, 1867, and considered that there are advantages in describing India as a Union although its constitution may be federal in structure." The term "union" has no specific meaning in constitutional law. It has been used in the Union of South Africa Act to describe a decentralized unitary State. In the Soviet Constitution it stands for a federal structure. In the latest constitution of France an attempt has been made to establish a constitutional nexus between the Republic of France and its associated territories and States on the analogy of the British Commonwealth of Nations, and the term "union" has been used to describe this relationship. The Canadian Constitution to which the Chairman of the Drafting Committee referred, used the term to describe the act of "federally uniting" the various provinces of the Canadian Dominion; it has nowhere been used as an appellation for the constitutional organization of Canada. It is also not clear what is exactly meant when it is stated that "there are advantages in describing India as a Union," unless it is intended that India should ultimately become a unitary State. However, the federal character of the Constitution finds substantial and unquestionable evidence in many of its provisions. We have already seen that there are two distinctive and essential characteristics of a federal State.* On the one hand, every federation is a unity and possesses all the features of an organic union *par excellence*. On the other hand, a federal State is also an association of States which possess and exercise powers of sovereignty conferred on them by the constitution, independently of the control of the federal government. Three consequences flow from the constitutional unity of a federation. In the first place, it is the federation alone which possesses inter-

¹ *Rassegna di diritto pubblico*, 1948, p. 5.

* Vide Chapter I.

national personality and is consequently the sole representative of the constituent States in international affairs. Thus, under the Constitution of the Indian Republic it is the Union Government which exercise all powers of sovereignty in regard to international matters, and the constituent States have no personality or authority from the point of view of international law. The second consequence of the organic unity of a federation is that federal laws override the laws of the constituent units in cases of conflict between them. Thus, under Article 254 of the Indian Constitution, if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by the Union Parliament, the law made by the Parliament prevails and the law made by the Legislature of the State is void to the extent of the repugnancy. Another consequence of the constitutional unity of a federation is that in cases of conflict between a constituent unit and the federation or between two or more constituent units, the federal constitution invariably provides for the settlement of disputes by a federal authority. It is for this reason that the Indian Constitution prescribes that the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Union Government and one or more States, or between two or more States.

The second essential characteristic of a federal State, as we have seen above, is that it is also an association of States, and this has two significant implications. In the first place, it signifies the co-existence of two sets of governments covering the same territory, "yet distinct and separate in their action." Thus, there is under the Indian Constitution the Union Government consisting of the Union Executive, the Union Parliament and the Union Judiciary. There is also in each constituent unit a full-fledged government covering every sphere of State activity. The second implication is that there is a clear-cut demarcation of competence between these two sets of governments. Thus, the Indian Constitution contains an elaborate scheme of distribution of legislative powers between the Union Government and the constituent States. The scheme comprises a double enumeration of powers and the assignment of residuary powers to the Union Government. The division of executive power follows the same general principles, although the actual exercise of the executive power of the Union may in certain cases be delegated to the authorities of the States.

The foregoing discussion makes it abundantly clear that the

constitutional organization embodied in the Indian Constitution possesses all the essential features of a federation. It must, however, be also pointed out that the Constitution contains evidence of centralism of an extreme character. Nowhere is this trait more clearly marked than in the distribution of powers between the Union and the constituent States. Thus, unlike all federations of the normal type other than the Dominion of Canada, residuary powers have been vested in the Union. The supremacy of the Union in the field of legislation has been further emphasized by empowering the Union Parliament to invade the sphere of State competence for the purpose of implementing international conventions and agreements. Another provision of an extraordinary character is to be found in Article 250 which expressly authorizes the Union Parliament to make laws with respect to any matter falling within the exclusive legislative jurisdiction of the States while a Proclamation of Emergency is in operation. Such a provision is directly opposed to the fundamental basis of federal constitutions and cannot be supported by any precedent. Equally strange and surprising are the provisions which specifically vest in the Union Government wide and extensive powers including the power to suspend the constitution of a State in the event of an emergency. As Hans Kelsen has rightly pointed out, the basic feature of every federal constitution is that it is as illegal for the federal government to encroach upon the powers expressly assigned to the component States as it is for the constituent units to trespass on the federal sphere.¹ It is therefore, abundantly clear that while the structure designed by the Constituent Assembly is undoubtedly federal in character, it does nevertheless possess marked features of a high degree of centralism.

Decentralism of the Indian Constitution. It is a noteworthy feature of the Indian Republic that it is not only a federation but also a decentralized unitary State. Originally the Indian Republic comprised two groups of federating units described in the Constitution as Part A and Part B States as well as States which were known as Part C States and territories not forming part of any constituent unit. These territories as well as Part C States were an integral part of the Indian Union and did not, therefore, possess the same rank and status as the federating States. They were both directly administered by the President of the Republic acting, to such extent as he thought fit, through a Chief Commissioner or a Lieutenant-Governor appointed

¹ *Oesterreichisches Staatsrecht*.

by him. Part C States could also be administered by the President acting through the Government of a neighbouring State. The Constitution expressly authorized the Union Parliament to establish a Legislature and a Council of Advisers or Ministers for any of these States, but these institutions could exercise only such powers and functions as were conferred on them by the Union Parliament. Part C States have now disappeared under the Constitution (Seventh) Amendment Act, 1956 and have become territories of the Indian Union, but they continue to retain the same constitutional position. It will, therefore, be evident that these territories correspond to the provinces of a decentralized unitary State, as, for example, the Provinces of the Union of South Africa.

A similar example of combination of federalism and decentralism is to be found in the Constitution of the Union of Burma. The territory of the Burmese Union comprises three States, the Shan State, the Kachin State and the Karenni State, and other semi-autonomous areas. The States have their own legislatures and possess the status of a federating unit. The semi-autonomous territories comprising by far the larger part of the Union have no separate existence apart from the Union itself, and the Union Parliament has full and complete authority over this entire area. The same combination of federalism and decentralism is to be found in the Constitution of the Federation of Ethiopia under which the only federating unit is the State of Eritrea, the rest of the territory forming part and parcel of Ethiopia. It would, therefore, be evident that the Indian Constitution is not the only example of this kind of curious combination of two different types of structural organization. A somewhat similar arrangement has been incorporated in the Soviet Constitution where, apart from the federated republics, there also exist entities of an inferior category described as autonomous republics and autonomous regions. Unlike Part C States in India, these autonomous republics and regions form an integral part of the federated republics, but they are also in direct constitutional relationship with the Union Government, and their rights and constitutional structure are established and guaranteed by the Federal Constitution so that they can be amended only by the Supreme Soviet of the Union.

CHAPTER IV

INTERPRETATION OF THE CONSTITUTION

General Clauses Act, 1897. Lord Simmonds, in the course of his judgement in *Attorney-General of Australia v. Regina*, (1957) 2 All. E.R. 45, observed that "in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive." It is submitted that this statement is not entirely accurate. The primary function of the judiciary under a federal constitution is to maintain the delicate equilibrium of the powers of governance distributed between the centre and the constituent units and to negative every attempt by either party to invade the domain assigned to the other. It is only when a constitution, whether federal or unitary, contains a Bill of Rights that the judiciary becomes the bulwark against encroachment by the legislature or the executive. This is the reason why judicial interpretation of the Indian Constitution is of paramount importance, and the Constitution has itself provided the solution to some of the problems which arise in this connexion. Clause (1) of Article 367 expressly lays down that "unless the context otherwise requires, the General Clauses Act, 1897 shall, subject to any adaptations and modifications that may be made therein under Article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India."¹

In the main, the Act contains three different categories of provisions. In the first place, Section 3 of the Act contains a detailed list of statutory definitions. This is in addition to the definitions embodied in the Constitution itself under Article 366. Secondly, the Act deals with the problem of the coming into operation of a statute of the Indian Parliament and provides that unless the contrary is expressed an Act of the Indian Parliament or Regulation made thereunder shall be

¹ The word "Dominion" is obviously an error because India, although a member of the British Commonwealth of Nations, is no longer a Dominion.

construed as coming into operation immediately on the expiration of the day preceding its commencement. When applied to the Constitution, it means that the Constitution came into operation at midnight on the 25th January, 1950. Thirdly, the Act deals with the effect of repeal of a statute and follows the rule laid down in the British Interpretation Act, 1889. Section 6 of the Act provides that unless a different intention appears, the repeal of a statute shall not (a) revive anything in force or existing at the time at which the repeal takes effect; or (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed. It would, therefore, be obvious that where any Act or law has been expressly repealed by the Constitution, Section 6 of the General Clauses Act, 1897, will apply. But, as we shall see, the rule embodied in this section is not applicable where an Act or statute becomes void as being contrary to the provisions of the Constitution. The Act also deals with several other unimportant matters of interpretation, such as the question of revival of repealed enactment, the extent of powers conferred by a statute, substitution of functionaries and construction of orders and rules, etc., issued under statutes.

Literal Interpretation. It would be clear from the foregoing examination that the General Clauses Act, 1897, does not provide any solution to the main problems which arise in connexion with the interpretation of a constitution. It primarily deals with a limited number of technical questions and thus leaves open the problem as to how the Indian Constitution is to be interpreted. What are the general rules which the Courts must follow in interpreting the text of the Constitution? No answer to this question is to be found in the Act of 1897, and the Courts have, therefore, been obliged to resort to the general rules of interpretation accepted by the common law as well as by other systems of jurisprudence.

The primary purpose of interpretation, it is evident, is to ascertain the meaning of the text which is to be interpreted, whether the text be a statute or a contract or any other form of legal instrument. The first rule which has been adopted by almost all systems of jurisprudence is, therefore, the rule of *in verborum sensu investigando*. This is the rule of grammatical interpretation and applies not only to statutes and constitutions but also to treaties and contracts. According to Grotius, "*Rectae interpretationis mensura est collectio mentis ex signis maxime probabilibus.*"¹ The rule is as old as Roman Law and is to be found in all systems of jurisprudence. It was thus stated by Lord Wensleydale in *Grey v. Pearson*, (1857) 6 H.L. Cases, 61: "In construing wills and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless they would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense may be modified so as to avoid that absurdity and inconsistency, but no further." Tindal, C. J. was equally explicit in the *Sussex Peerage Case*, (1844) 11 C.L. & F. 85, that the only rule for the construction of statutes is that they should be construed according to the intention of Parliament. If the words of a statute are in themselves precise and unambiguous, then the words must be construed in their natural and ordinary sense, for in such a case the words themselves best declare the intention of the legislature. In *Wimpy & Co., Ltd. v. B.O.A.C.*, (1954) All. E.R. 661, the question was raised with regard to the interpretation of Section 6 (1) of the Law Reform (Married Women and Tortfeasors) Act, 1935 which reads as follows: "Where damage is suffered by any person as the result of a tort (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage." In that case the question was whether the defendants who had been held not liable in a suit brought against them by the aggrieved party could be held liable under Section 6 (1) of the Act. The House of Lords by a majority held that the defendants were not liable under the Act. Lord Simmonds observed that the question was whether Section 6 (1) could, according to its natural meaning, be so interpreted as to admit a claim for contribution by one tortfeasor against another when that other had been sued by the injured person and held not liable. He held that he could not be so liable on the ground that it was plain

¹ The criterion of correct interpretation is to establish the intention according to the most probable significance.

beyond argument that the word "liable" according to its natural meaning could only mean held liable in judgement. He further observed that if the intention of the Section had been to include a class of persons who, having been already sued and found not liable, might yet, in hypothetical proceedings, be sued a second time and then found liable, he would have expected to find it expressed in clear and appropriate language.

The same rule obtains in the United States of America. There, it has been repeatedly laid down by the highest tribunals in connexion with the interpretation of the Constitution that the Constitution must be so construed as to give effect to the intent and the object designed to be accomplished; and the intention is to be found in the instrument itself; and the words of the instrument must be taken in their natural sense except where it would lead to absurdity, ambiguity or contradiction. (*United States v. McBride*, 287 F. 214). The High Court of Australia has followed the same rule. Thus, in *T. & G. Mutual Life Assurance Society v. Howe*, 31 C.L.R. 290, where the question was raised as to the meaning of the term "resident" in Section 75 (IV) of the Constitution, it was laid down by the Court that the word was to be given its plain and natural meaning, and the majority of the Judges, therefore, held that the term "resident" did not include corporations because "corporations are not residents in any literal sense; because they cannot perform the essential functions which the term denotes; they cannot live in some particular part as distinguished from all other parts." The same view was taken by Isaacs, J. in *Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd.*, 28 C.L.R. 129: "It is, therefore, in the circumstances the manifest duty of this Court to turn its earnest attention to the provisions of the Constitution itself. That instrument is the political compact of the whole of the population of Australia, enacted into binding law by the Imperial Parliament, and it is the chief and special duty of this Court faithfully to expound and give effect to it according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed."

Continental jurisprudence also emphasizes the paramountcy of the text of a statute and the importance of literal interpretation. Thus, the Supreme Court of France (*Cour de Cassation*) has, in a case dealing with the interpretation of a taxing statute, laid down the rule as follows: "It is above all in the text itself of the statute which establishes the taxes that one must seek as to what was the intention of the legislature

and it is the provisions of the statute in which it has manifestly expressed its intention which must receive the strict and literal application which their tenor commands." (*In re Institut des Frères des Ecoles chrétiennes*, 1889. Sirey. 1. 537). The Court of Cassation has, therefore, repeatedly held that the text of a statute must be construed according to the normal and natural sense of its words and that it is not permissible to introduce any distinctions or additions under the pretext of interpretation. Thus, in *Lasry v. Compagnie bordelaise des produits chimiques*, 1953. Sirey. 1. 49, the question was raised as to the interpretation of Article 215 of the Commercial Code which provides that a ship ready to set sail from a port in France cannot be seized except for debts contracted for the voyage. It was argued before the Court of Appeal at Montpellier that a ship registered in a foreign country could not avail itself of the provision of this Article. This contention was rejected by the Court of Appeal and, on further appeal, the decision was confirmed by the Court of Cassation which held that the decision of the Court of Appeal was an exact application of the text of the Article which makes no distinction between ships registered in France and those registered in foreign States.

The same principle has been adopted in other countries on the continent of Europe. For instance, Article 84 of the Swedish Constitution specifically lays down that "the fundamental laws shall be effective according to their literal meaning." In *Minister of Agriculture & Forests v. Boncompagni*, 1953. Giur. it. 1.1.94, the Italian Supreme Court has held that a judge must closely follow the text of a statute and cannot proceed freely on the basis of his own criteria and abstract conceptions; he is legally bound to serve the law and is not free in his *potestas decidendi*. The Court, therefore, came to the conclusion that a decree issued by the President of the Republic by virtue of power vested in him under Article 5 of the Statute of 12th May, 1950, was not an administrative act and was incompatible with the actual text of Article 113 of the Constitution. It, therefore, held that the decree was void and could not be enforced. The Supreme Court of Spain has also laid down that the primary obligation of a judge is to ascertain the probable intention which is to be gathered from the terms themselves. (*Decision of the Supreme Court*, 30th September and 13th November, 1864). The same view was embodied in the German Civil Code of 1900, although in recent years there has been a growing tendency amongst German jurists to allow a greater latitude to judges (*Freies Recht*), particularly in cases where there are *lacunae* in a

statute. (*Lücken im Recht*)¹ The Supreme Court of India has adopted the same view. In *Jugal Kishore v. Raw Cotton Co.*, A.I.R. (1955) S.C. 376, Das, J. (now C. J.) has thus stated the rule: "The cardinal rule of construction of statutes is to read the statute literally, that is by giving to the words used by the Legislature their ordinary, natural and grammatical meaning. If, however, such a reading leads to absurdity and the words are susceptible of another meaning, the Court may adopt the same. But if no such alternative construction is possible, the Court must adopt the ordinary rule of literal interpretation. In the present case a literal construction of the rule leads to no apparent absurdity and, therefore, there can be no compelling reason for departing from that golden rule of construction."

From the foregoing discussion it is abundantly clear that the primary rule of interpretation which has been universally accepted is the rule of literal interpretation. In other words, a judge is not only required to apply the text of a statute to a particular case but also to construe the text according to the natural and grammatical meaning of the words. Reliance is, therefore, generally placed on standard dictionaries for the explanation of words used in statutes. Thus, in *Campden v. I.R.C.*, (1914) 1 K.B. 641, Cozens Hardy, M.R. observed as follows: "It is for the Court to interpret the statute as best it may. In so doing the Court may no doubt assist themselves in the discharge of their duty by any literary help they can find, including of course the consultation of standard authorities and reference to well-known and authoritative dictionaries." The meaning of words given in dictionaries is not, however, necessarily binding on courts as pointed out by Lord Macnagten in *Midland Railway v. Robinson*, (1890) 15 A.C. 19. A recent case before the Court of Appeal in England shows how far such reliance is permissible. In that case, *Regina v. Agricultural Land Tribunal*, (1955), 2 Q.B. 140, the question was raised as to the meaning of Clause 5 of Section 104 of the Agricultural Act, 1947, which reads as follows: "No officer or servant of a county agricultural executive committee, or any sub-committee or district committee thereof, shall be appointed under the last foregoing subsection to receive representations relating to land in the area of the county." It was argued on behalf of the Crown that this provision did not exclude any sub-committee or district committee on the ground that a second "of" should be read into the Act thus making it read that it was only the

¹ See Zitelmann, *Lücken im Recht*, Leipzig, 1905.

officer or servant of a sub-committee who was excluded. In support of this contention, reference was made to Fowler's *Modern English Usage*. This contention was not, however, accepted by the Lord Chief Justice who expressed the view that he knew the modern English usage of farmers and was certain that no farmer would understand what that great grammarian was setting out. He also observed that even a lawyer reading Section 104(5) would say that it was obvious that officers and servants of the county executive committees, and sub-committees were barred from receiving the representations. The proceedings instituted by the Crown were, therefore, held bad *ab initio*. An interesting illustration of the application of the rule is to be found in the judgement of the High Court of Ontario, Canada in *Mester v. Kumm*, (1958) 11 D.L.R. 217. There the question was as to what was the exact meaning of the word "reside". The Court, in delivering its judgement, said: "The word 'reside' is a familiar English word and is defined in the *Oxford English Dictionary* as meaning 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live'. No doubt this definition must for present purposes be taken, subject to any modification which may result from the terms of the Income Tax Act and Schedules; but subject to that observation, it may be accepted as an accurate indication of the meaning of the word 'to reside'."

Exceptions to Literal Interpretation. There are, however, three main exceptions to the general rule of literal interpretation. In the first place, as Lord Wensleydale pointed out, where the ordinary and grammatical meaning of the text of a statute leads to manifest absurdity, the literal meaning must be modified. "You are not so to construe the Act of Parliament as to reduce it to rank absurdity," observed Lord Lindley, "you are not to attribute to general language used by the Legislature in this case more than in any other case, a meaning which would not carry out its object, but produce consequences which, to the ordinary intelligence, are absurd." [*In re the Duke of Buccleugh*, (1891) A.C. 310. See also *State of Punjab v. Ajai Singh*, (1953) S.C.R. 254, at p. 264]. In such cases, therefore, the plain and ordinary meaning of words must be modified, as Maxwell points out, by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, by rejecting them altogether or by interpolating other words, under the influence no doubt of irresistible conviction that the legislature could not possibly have intended what the words signify and the modifications

thus made are mere corrections of careless language and really give the true meaning.¹ But such modifications are only permissible in cases of patent and gross absurdity. A note of warning was, therefore, rightly sounded against this exception by Lord Greene, M. R. in *Grundt v. Great Boulder Gold Mines Ltd.*, (1948) 1 All. E. R. 21: "Absurdity, I cannot but help think, like public policy, is a very unruly horse It is a doctrine which has to be applied with very great care remembering that judges may be fallible in this question of an absurdity, and in any event it must not be applied so as to result in twisting language into a meaning which it cannot bear. It is a doctrine which must not be used to re-write the language in a way different from that in which it was originally framed."

The second exception prescribes that cognate provisions of a statute must be read together in order to avoid any repugnancy or inconsistency. This is generally known as interpretation *ex visceribus actus* and is thus explained by Coke: "It is the most natural and genuine exposition of a statute to construe one part of a statute by another part of the same statute, for that best expresseth the meaning of the makers . . . and this exposition is *ex visceribus actus*." [*Lincoln College Case*, (1595), 3 Co. Rep. 59b]. An authoritative modern version of the rule is to be found in the judgement of Lord Hershell in *Colquhoun v. Brooks*, (1889), 14 App. Cas. 493: "It is beyond dispute, too, that we are entitled, and indeed bound, when construing the terms of any provision found in a statute, to construe any other parts of the Act which throw light on the intention of the legislature, and which may serve to show that the particular provision ought not to be construed as it would be alone and apart from the rest of the Act."² The rule is known to Italian jurisprudence as the *canone di totalità* and is founded upon Article 1363 of the Civil Code which lays down that in the interpretation of a clause of a contract, as of every other form of juridical act, one clause must be interpreted in the light of another, attributing to each clause the meaning which emerges from the complete examination. (*Narducci v. Narducci*, 1953. *Giur. it.*, 1.1.189). The Italian Constitutional Court has also emphasized the necessity of interpreting a legislative document as a whole. In a recent case the Court observed as follows: "Individual provisions are not to be considered as isolated provisions and complete in themselves,

¹ Maxwell, *Interpretation of Statutes*, p. 229.

² See also the recent decision of the House of Lords in *Attorney-General v. Prince Ernest Augustus of Hanover*, (1957) A.C. 456.

but must always be interpreted in their reflections and repercussions on other provisions as parts of an organic system which is in a continuous process of development and in which every effort must be made to eliminate the conflicts, the lack of harmony, the discrepancies and the *lacunae*." (*In re Luigi Cecchini*, Giur. cost. 1957, p. 319). The same rule has been applied in the interpretation of the Canadian Constitution Act. Thus, the Privy Council has laid down that Section 91 of the British North American Act, 1867, which prescribes the legislative competence of the Dominion Parliament and Section 92 which prescribes that of the Provincial Legislature, must be read together, and the language of the one interpreted, and, when necessary, modified by that of the other. [*Citizens Insurance Company v. Parsons*, (1881) 7 App. Cas. 96]. In the Commonwealth of Australia it has been laid down that the Australian Constitution must be read as a whole so as to give complete effect to all its provisions and in order to prevent any inconsistency or absurdity.

It should at the same time be observed that the exception is not applicable where the language of the provision of a statute is clear and unambiguous. Thus, Tindal, C. J. observed as follows in *Warburton v. Loveland*, (1831) 2 Dow. & C.L. 480: "No rule of construction can require that when the words of a statute convey a meaning . . . it shall be necessary to introduce another part of the statute . . . to diminish the efficacy of other provisions." However, this observation, it is obvious, cannot be applicable in cases where there is clear and unmistakable inconsistency between two or more provisions of a statute. The American Courts have also followed the same principle. (See Black, *Constitutional Law*, p. 81). The same rule obtains under other systems of jurisprudence. (See, for instance, the decision of the Supreme Court of France in *In re Rihane and others*, 1953. Sirey, 1.1.7).

In the third place, the ordinary meaning of words must be modified when it is clear from the context that the words have been used in a special or technical sense. The rule was thus laid down by the Privy Council in *Corporation of the City of Victoria v. Bishop of Vancouver Island*, A.I.R. 1921 at pp. 240-242: "In the construction of statutes, their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute, in which they occur or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense." In *Unwin v. Hansom*, (1891)

2 Q.B. 115, it was observed by Lord Esher that if an Act is directed to dealing with matters affecting the public generally, the words have the meaning attached to them in the common and ordinary use. Where, however, an Act deals with a matter relating to a particular trade, business or transaction and the words are used which everybody conversant with such trade, business or transactions knows to have a particular meaning, then the words are to be construed as having that particular meaning though it may differ from the ordinary meaning. Whether the words used in a statute carry a technical meaning or not must depend on the circumstances of the case. The same rule has been followed under other systems of jurisprudence. For instance, in a recent case in Italy the question was raised with regard to the meaning of the words "defect of jurisdiction". It was argued that defect in the composition of the Supreme Administrative Court (*Consiglio di Stato*) did not fall within the meaning of "defect of jurisdiction" and, therefore, the judgement of the Court could not be challenged. This argument was not, however, accepted by the *Corte di Cassazione* which held that the term "defect of jurisdiction" had a special meaning, and observed as follows: "The word 'jurisdiction' in the law and doctrine of procedure means the right and obligation of an organ to which the law attributes jurisdictional functions of taking cognisance of and deciding matters within the limits of its attributes; hence 'defect of jurisdiction' means the organ's lack of power to take cognisance of and decide the matter which has been submitted to its judgement." Therefore, they held that where a court has not been duly constituted it would not have the necessary power of jurisdiction, and this naturally came within the meaning of the term "defect of jurisdiction". (*Tesaro v. Mortati*, 1953. *Giur. it.*, 1.1.) The same rule has been followed by the French Courts. Thus, the Supreme Court has held that the words "publication in the *Official Gazette*" used in the Statute of the 14th February, 1946, did not have their ordinary meaning and, did not mean "insertion in the *Official Gazette*" but referred to the procedure prescribed for publication under Article 2 of the Decree of the 5th November, 1870. (*Administration de l'Enregistrement v. Lesieur*, 1953. *Sirey*, 1.9.) Another interesting instance is furnished by the judgement of the arbitrators in the dispute between Chile and Peru in 1871. There the question was raised as to the meaning of the words "to charge" and "liquidation". The arbitrators decided that the first term had been used in its ordinary sense and referred to Webster's Dictionary for its meaning. They

were, however, of the opinion that the word "liquidation" has a technical meaning and accepted the definition given in Bouvier's *Law Dictionary*. It is, therefore, clear that the ordinary meaning must be adopted unless the context provides adequate reason for accepting the technical meaning. Thus, in *Dwarkanadas Agarwall v. Dharamchand Jain*, A.I.R. (1954) Cal. 583, Chakravarti, C.J. dealing with the question of the meaning of the word "debts" in Section 38 (1) of the Banking Companies Act, 1949, observed as follows: "The word 'debts' is used in the section *simpliciter* and unless there is something else in the context or other parts of the section which suggests a limited meaning, there would seem to be no reason why a word apparently used in the general sense should be understood as limited to a particular meaning."

Logical Interpretation. It has rightly been observed that a judicial decision is in the nature of a logical syllogism. The major premise is the legal rule which has to be applied and the minor premise is constituted by the circumstances of the case.¹ Therefore, where the major premise becomes clear and unambiguous as a result of literal interpretation, no difficulty arises with regard to its application to the minor premise. This, however, is not always the case. The norm embodied in the text may be obscure, incomplete or insufficient, and in such a contingency the rule of literal interpretation affords no assistance in the application of the norm. Hence arises the second rule which is known as the rule of logical interpretation. The German theory of the rule is that every legal norm is complete in itself and, therefore, covers every possible case which falls within its ambit, either expressly or by implication. This is known as *die logische Geschlossenheit des Rechts*, although the doctrine has in recent years been severely criticized.² Whether this explanation is acceptable or not, it is clear that the object of every logical interpretation is to ascertain the intention of the legislature and it cannot, therefore, travel beyond the actual words of the text. As Ihering has observed, the object of logical interpretation is to penetrate the words of the text in order to seek the intention of the law. Logical interpretation has been described as construction, and a distinction has been drawn between interpretation and construction. For instance, Cooley makes the following observation: "Interpretation differs from construction in that the former is the art of finding out the true sense of any form

¹ Plaza, *La casacion civil*, Madrid, 1944, pp. 152-154.

² See Jellinek, *Allgemeine Staatslehre*, pp. 355-360.

of words . . . Construction, on the other hand, is the drawing of conclusions regarding subjects that lie beyond the direct expression of the text, from elements known from and given in the text; conclusions which are in the spirit, though not within the letter, of the text."¹ It should, however, be pointed out that there is no real or fundamental difference between the two processes, for every judicial decision is in the nature of a logical syllogism. Crawford also points out that construction and interpretation are not the same but admits that "the distinction, however, between the two processes is often vague, and so far as the Courts are concerned, apparently has little or no importance." He further adds that "the whole matter has been largely relegated to the realm of academic discussion, since for most practical purposes it is sufficient to designate the whole process of ascertaining the legislative intent as either interpretation or construction," and cites as authority the decision of the Supreme Court in *United States v. Keitzel*, 211 U.S. 370.

The cases which fall within the purview of this rule of interpretation may be grouped under three different categories. In the first place, the provision contained in a text may be silent on a matter which would appear to fall within its meaning; or a provision may not expressly deal with a matter which is allied to the subject expressly dealt with in the provision; or there may be cases where a matter though apparently falling within the text could not have been contemplated at the time when the constitution or the statute was enacted. A typical instance is furnished by Griffith, C.J. of the Australian High Court in *Attorney-General for New South Wales v. Brewery Employers' Union*, 6 C.L.R. 469. In that case the learned judge observed that many new developments unthought of when the Australian Commonwealth Act, 1900, was enacted might arise with respect to many subject matters and so long as these new developments relate to the same matter they would fall within the legislative powers, and cited the instance of the postal and telegraphic powers of the Commonwealth which, according to him, would extend to wireless telegraphy, although it was unknown at the time of the enactment of the constitutional statute. Another instance is furnished by the decision of the Privy Council in the case of *In re Regulation and Control of Radio Communication*, (1932) A.C. 304, where it was held that the provisions of the Canadian Statute relating to inter-provincial broadcasting

¹ *Constitutional Limitations*, p. 70.

were valid because the matter came within the meaning of Section 92 (10) (a) which relates to inter-provincial telegraphis, works and undertakings, etc. In both these cases although broadcasting was totally unknown at the time when the Constitution Acts were enacted, it was held that it came within the text of the Statutes on a logical interpretation of the words. The same view has been accepted in the United States of America. For instance, in *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, Hughes, C.J. observed as follows: "It is no answer to say that this public need was not apprehended a century ago, or to assert that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation." This is, however, an extreme statement of the rule. The more correct view is to be found in the dissenting judgement of Sutherland, J. He said: "A provision of the Constitution, it is hardly necessary to say, does not admit of two distinctly opposite interests. It does not mean one thing at one time and an entirely different thing at another time . . . This view, at once so rational in its application to the written word, and so necessary to the stability of constitutional principles, though from time to time challenged, has never, unless recently, been put within the realm of doubt by the decisions of this court. . . . Chief Justice Taney, in *Dred Scott v. Sandford*, 19 How. 393, 426 said that while the Constitution remains unaltered it must be construed now as it was understood at the time of its adoption; that it is not only the same in words but the same in meaning, 'and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States.' . . . The provisions of the Federal Constitution, undoubtedly, are pliable in the same sense that in appropriate cases they have the capacity of bringing within their grasp every new condition which falls within their meaning. But, their *meaning* is changeless; it is only their *application* which is extensible." In *James v. Commonwealth*, 55 C.L.R. 1., Lord Wright made a similar observation: "It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general and their full

import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning."

The same question arises when there are *lacunas* in the text. A typical instance is furnished by the decision of the *Tribunale Correctionnelle de Toulon* in a recent case. (1953. Sirey. 1.2.101.) There the question arose with regard to the interpretation of Article 330 of the Penal Code of France, as amended by the Statute of the 13th May, 1863. Article 330 penalizes "public outrage against decency" but does not provide any definition of the offence. It has, therefore, been left to the courts to define the offence upon a logical interpretation of the terms of the Article. In the case in question the Court laid down that there are three elements of the offence: (1) the factum of outrage against decency, (2) the publicity given to the act by the offender, and (3) the criminal intention evident from the act itself. The facts of the case were that the accused, a member of a nudist colony, had traversed a public street *entièrement nu* but without offensive gesture or attitude. The Court held that as the act had taken place in an isolated island and, consequently, there was no great publicity attached to it, no criminal intention could be deduced from the act itself and, therefore, the accused had not offended against Article 330 of the Penal Code. The same view is held by the courts in England in regard to interpretation of a statute which is silent in respect of a matter falling within its logical ambit. Thus, as Maxwell points out, a statute which simply creates a corporation but does not expressly grant any powers to it, is deemed to have given the corporation all the general legal attributes which are associated with a corporation.¹

Interpretation by Analogy. Where the text of a statute is clear but its exact ambit is doubtful, the rule of analogy comes into play. The basic principle of this kind of interpretation is founded on the maxim, *ubi eadem ratio, idem jus*. In other words, the rule can only apply where the legal identity of the circumstances justifies extension by analogy. This rule of interpretation seeks to ascertain the fundamental reason of the provision of the text (*ratio juris*) and applies the same rule to similar circumstances. It is, therefore, based upon the fiction of an intention of the legislature which it has not clearly

¹ Maxwell, *op. cit.*, p. 358.

expressed. This is the principle which German jurists have summed up in the maxim, *was dem Einem recht ist, das ist dem Andern billig*.¹ The rule of interpretation by analogy has not, however, been fully adopted by English Courts and has generally been confined to the extension of the rules of the common law. It was, for instance, laid down by the Privy Council in *Ramchander Dutt v. Joghesh Chander Dutt*, (1873) 19 W.R. 353, that "arguments from analogy may arise where a principle of law is involved; but where the Courts are dealing with the positive enactments of a statute, reasons founded upon analogies are scarcely applicable." This observation, however, goes too far, and the more correct view of English law appears to be that analogy is only permissible where it inevitably flows from the text of a statute. For instance, Maxwell cites cases where Acts of Parliament, which gave a "single woman" who had a bastard child the right to sue the putative father for its maintenance, were held to include in that expression not only a widow but also a married woman living away from her husband.² Thus, in *Kruhlack v. Kruhlack*, (1958) 1 All E.R. 154, it was held that a married woman living apart from her husband under a separation order containing a non-cohabitation clause was a "single woman" as against her husband for the purpose of the bastardy laws. Devlin, J., in the course of his judgement, observed that "it had been settled by a series of cases that in construing the expression 'single woman' the courts would have regard to the *de facto* position of the woman rather than to her status in the eyes of the law." He also pointed out that "the artificiality of the construction which the courts had given to the expression 'a single woman' was brought into high relief when a wife asserted against her own husband that she was a single woman."

The same rule is to be found in the jurisprudence of France. For instance, Geny cites the case of the statute which deals with guardianship of minors under control and which has been extended to cover the cases of minors who have been released from control. Thus the rules regarding incapacity and causes of exclusion and destitution have been extended by analogy from the case of unreleased minors to that of released minors.³ In Italy, on the other hand, the rule of

¹ German jurists distinguish between *Gesetzesanalogie* and *Rechtsanalogie*. Here we are only concerned with *Gesetzesanalogie*.

² See Maxwell, *op. cit.*, p. 70 and the cases cited therein.

³ Geny, *Méthode d'interprétation et sources en droit privé positif*, Vol. I., pp. 305-306. See also *Demoiselle Guehenneux v. Le Louz*, Sirey, 1957, 248, where the benefit of a law in favour of illegitimate issues of adulterous or incestuous intercourse has been extended to illegitimate children not born of such an intercourse.

analogy has been set forth in Article 12 of the preliminary provisions of the Civil Code of 1942 which *expressis verbis* enjoins upon judges to follow the rule of analogy where the text of a statute is silent or insufficient. An interesting illustration of the rule is to be found in the judgement of the Italian Supreme Court in *Minister of Agriculture & Forests v. Boncompagni*, 1953. Giur. it., 1.1.94. In that case the question was raised as to whether the regulations relating to jurisdiction of courts were applicable to cases pending before the Council of State (the Supreme Administrative Court). In deciding the question in favour of the application the *Corte di Cassazione* held that Articles 41 and 37 of the Code of Civil Procedure were only applicable to proceedings before ordinary courts; but, the Court observed, "the rule constitutes the manifestation of a much more extensive principle which could be ascertained by systematic interpretation and by re-construction of the *mens legis* which animates and vivifies the entire material relating to the determination of questions of jurisdiction." The Court, therefore, held that on the analogy of the ordinary courts of law, the regulations relating to jurisdiction were applicable to the proceedings before the Council of State.

It should, however, be borne in mind that the rule of analogy, where permissible, can only apply under certain special circumstances.¹ In the first place, the rule only comes into play when the text clearly and unmistakably admits its application. This is analogous to the rule of the common law that the extension of a statute is confined to its strictly necessary incidents or logical consequences. Secondly, the rule does not apply where the law demands strict interpretation of the text. An interesting case in point is furnished by the judgement of the Court of Appeal of Lyons in *Martin v. Sautel*, 1953. Sirey. 2. 165. There a husband, who had bequeathed his entire estate to his wife as a universal legatee, was killed by her during the course of a quarrel. Immediately after the crime, the wife executed a will making her brother universal legatee and thereafter committed suicide. The will was contested by the heirs of the deceased husband. It was contended on behalf of the legatee that the suit was not maintainable under Article 957 (2) of the Civil Code which provides that the revocation of a gift on the ground of ingratitude on the part of the donee cannot be made by the donor against the heirs of the donee.

¹ See Maxwell, *op. cit.*, pp. 359-362.

The Court held that "Article 957, Civil Code is an exceptional provision, not only because it prohibits action after a very brief period but also because it constitutes a double derogation to the principle that an heir continues the personality of the deceased; and it cannot, therefore, be extended under the pretext of analogy." The same view has been expressed by the French Courts in respect of penal or taxing statutes where the rule of strict interpretation is followed. (See, for instance, *In re Société Civile de Sainte-Pontique*, 1900. Sirey. 1. 531.) The same rule has been uniformly followed by the Italian Courts. Thus in *Minister of Aeronautical Defence v. Cusmano*, 1953. Giur. it., 1.1.298, it has been held by the Supreme Court of Italy that the rule contained in the last clause of Article 111 of the Constitution, which imposes limitations on revision of the decisions of the Council of State and the Court of Accounts, is of an explicit character and does not permit extension by analogy. Similarly in *Chiotti v. Henriod*, 1953. Giur. it. 1.1.1008, the Supreme Court has held that Article 1350 of the Civil Code, which requires written documents for certain types of contracts of agency, is of an exceptional character and, therefore, excludes analogical interpretation.

Recourse to Extraneous Aids. Where the text is obscure or insufficient, the courts are entitled to refer to two classes of circumstances for ascertaining the real intent of the legislature. The first class covers reference to other parts and provisions of the statute, such as the title, the preamble, and the marginal notes. The common law rule is that the title of a statute is an integral part of the Act and may be referred to for the purpose of ascertaining the general scope of the Act and throwing light on its construction. It is not, however, conclusive evidence of the intention of the legislature, and the construction of a statute cannot be limited by its title. It can only be taken into consideration as an aid in ascertaining the legislative will where the text is ambiguous.¹ The same rule is applicable under the common law to the preamble to a statute. It may, therefore, legitimately be consulted to solve any ambiguity or to determine the meaning of words which may have more than one or to keep the effect of the Act within its real scope. Thus, in *Attorney-General v. Prince Ernest Augustus of Hanover*, (1957) A.C. 436, Lord Simmonds observed: "Assistance may be obtained from the preamble to a statute in ascertaining the meaning of the relevant enacting part

¹ See Maxwell, *op. cit.*, p. 42.

since words derive their colour and content from their context. But the preamble is not to affect the meaning otherwise ascribable to the enacting part unless there be a compelling reason." The Supreme Court of India has also laid down in *In re Kerala Education Bill*, A.I.R. (1958) S.C. 956, that the policy and purpose of a statute may be gathered from its long title and preamble. Similarly, the heading of a section or a marginal note may be referred to for the purpose of arriving at a conclusion as to what, according to the legislature, was the purpose of enacting the section. In *Bengal Immunity Co., Ltd. v. State of Bihar*, A.I.R. (1955) S.C. 661, the Chief Justice of the Supreme Court of India referred to the marginal note to Article 286 of the Constitution. See also *Madanlal v. Changdeo Sugar Mills Ltd.*, A.I.R. (1958) Bom. 491.

The jurisprudence of other countries, however, permits greater latitude in the use of the preamble to a statute. A recent decision of considerable importance is to be found in the judgement of the Tribunal de Paix of Paris in *El Hadi Djouri v. Société Amicale de Bien-faisance*, 1953. Sirey. II. 96. There the question was raised as to whether a subject of Morocco could claim the rights conferred by Article 8 of the Statute of the 1st September, 1948, on proprietors of immovable properties in France. The Court held that as Morocco was a protected State and not a member State of the French Union, a Moroccan subject could not claim the benefit of Article 81 of the Constitution of 1947 which placed French nationals and inhabitants of the French Union on the same footing and ensured them the enjoyment of the same rights and liberties. The Court, however, proceeded to refer to the preamble to the Constitution which proclaims the equality of rights and obligations between France and the nations and peoples which form one community with her. Therefore, as protected States form part of the French community, they held that individuals of such nations enjoy the same civil rights as French nationals by virtue of the preamble to the Constitution.

Generally speaking, all systems of jurisprudence also permit resort to other extraneous aids where the text is obscure or ambiguous. The most important of such aids may be grouped under the heading of *travaux préparatoires* which include proceedings in Parliament and reports of parliamentary committees or commissions. Thus, in the United States it has been held that in order to ascertain the meaning and purpose of a provision of the Constitution, resort may be had to extraneous facts, such as the earlier state of the law, the

circumstances of contemporary history or the discussions in the Constitutional Convention. (*Maxwell v. Dow*, 176 U.S. 581.) Indeed, two of the most outstanding judges of the Supreme Court, Marshall, C. J. and Storey, J., have gone to the length of referring to Hamilton's *The Federalist* for elucidating doubtful points of law. (See *McCulloch v. Maryland*, 1819, 4 Wheaton, 434; and *Prigg v. Pennsylvania*, 1842, 16 Peters, 561-562). A more recent view of the matter has been thus stated by the Supreme Court in *Inhoff-Berk Silk Dyeing Co. v. U.S.*, 43 Fed. 836: "While legislative debates, partaking of necessity of impromptu statements and opinion, cannot be resorted to, with any confidence as following the true intent of Congress in the enactment of statutes, a somewhat different standard obtains with reference to the pronouncement of committees having in charge the preparation of such proposed laws. These committees' announcements do not, of course, carry the weight of a judicial opinion, but are rightfully regarded as possessing very considerable value of an explanatory nature regarding the legislative intent where the meaning of a statute is obscure."

A strict view now prevails in England. Thus, in *Vacher & Sons Ltd. v. London Society of Compositors*, (1913) A.C. 113, Lord Haldane observed that he had no intention to enter into speculations regarding the intention of Parliament, for such intention must be ascertained from the terms in which the legislature has finally expressed its conclusions. He, therefore, excluded from consideration every matter other than the state of the law at the time the statute was enacted. Dicey thus explains the view generally held in England: "An English Judge will take no notice of the resolutions of either House or of anything which may have passed in debate (a matter of which he officially has no cognisance) or even of the changes which a bill may have undergone between the moment of its first introduction to Parliament and of its receiving the Royal Assent."¹ This would, however, appear to be an extreme statement of the rule. Originally a more liberal and reasonable view was taken by the English Courts. Thus, in *S.E. Railway v. Railway Commissioner*, (1880), 5 Q.B.D. 217, Cockburn, C.J. made the following observation: "Where the meaning of an Act is doubtful, we are, I think, at liberty to recur to the circumstances under which it passed into law as a means of solving the difficulty." A reference was accordingly made to the speeches introducing the

¹ *Law of the Constitution*, p. 403,

Bill in the House of Commons and in the House of Lords. This view was subsequently disapproved by the House of Lords in *Julius v. Bishop of Oxford*, (1880), 5 App. Cas. 214. The correct view would, however, appear to be that while it is not permissible to refer to parliamentary debates in dealing with the interpretation of an obscure text, such reference is admissible when it forms part of the surrounding circumstances leading to the enactment of the statute. In *Eastman Photographic Materials Co. v. Comptroller-General of Patents*, (1898), A.C. 571, Lord Halsbury expressed the view that for the purpose of construing the Patents Act, 1888, reference could be made to the report of a commission appointed to enquire into the working of the Patents Act of 1883. The scope of this observation was, however, of a limited character, and, as pointed out by Lord Wright in *Assam Railways & Trading Co. v. Inland Revenue Commissioners*, (1935) A.C. 445, reference was made by Lord Halsbury not directly to ascertain the intention of the words used in the Act but as the "more accurate source of information as to what was the evil or difficulty which the Act of Parliament now under construction also intended to remedy." It would, therefore, appear to be clearly established that reference to *travaux préparatoires* can only be made under the common law as an integral part of "such external or historical facts as we may find necessary to make us understand the subject matter to which the instruments relate and the meaning of the words employed." [Lord Langdale in *Gorham v. Bishop of Exeter*, (1850), 14 Jur. 443]. This view has also been endorsed by Lord Akin in *Attorney-General for British Columbia v. Attorney-General for Canada*, A.I.R. 1937 P.C.91, where the question was raised with regard to reference to the report of a Royal Commission: "It would not be contended that the statement of the Minister in the order of reference that the section was enacted to give effect to the recommendations of the Royal Commission bound the Provinces or must necessarily be treated as conclusive by the Board. But when the suggestion is made that the legislation was in truth criminal legislation, but was in substance merely an encroachment on the provincial field the existence of the report appears to be a material circumstance." The stricter rule of interpretation has also been followed in Australia where it has been laid down by the High Court that reference to the Convention Debates regarding the Australian Constitution is not permissible. (See *Municipal Council of Sydney v. The Commonwealth*, 1 C.L.R. 208). The courts in India have followed the same rule. Thus, in *Prativa Sasmal v. Agricultural Income Tax*

Officer, A.I.R. (1958) Cal. 585, the High Court of Calcutta has held that although the proceedings in the legislature are not relevant for the interpretation of statutes, they may be referred to for ascertaining the background, that is to say, the reasons which impelled the legislature to enact a statute in a particular way. In *Gopalan v. State of Madras*, A.I.R. (1950) S.C. 27, it was observed by Kania, C.J. that it was permissible to refer to debates in the Constituent Assembly for the purpose of indicating that the attention of the members was drawn to a particular word or phrase. Patanjali Sastri, J. also referred to the existence of the word "sedition" in Article 13 (2) of the Draft Constitution and its final deletion. In *Ram Nandan v. State*, A.I.R. (1959) All. 101, it was held that while a reference to the debates in the Constituent Assembly and the Report of the Drafting Committee might not be permissible to interpret a section when it is clear, the debates and proceedings have value as a matter of historical interest and can, therefore, be referred to for the purpose of elucidating a point.

This rigid canon of interpretation has not, however, been accepted by the jurisprudence of continental and Latin American countries. For instance, under the law of France it is permissible to refer to *travaux préparatoires* in cases of obscurity or ambiguity of a text, but, as Geny points out, French Courts have not always attached much importance to the evidence of parliamentary proceedings. The judgement of the Cour de Cassation in *In re Pelissier du Basset*, 1928. Dalloz. 1.31., provides an interesting example of how reference to parliamentary proceedings has been used to interpret an ambiguous text. In that case the question arose as to the meaning of Article 19 of the Statute of the 10th August, 1920, and Article 14 of the Statute of the 15th May, 1924. The Court in interpreting these Articles referred to the proceedings before Parliament and the amendments which had been introduced during the course of the proceedings and thus gave a meaning to the Articles based upon the evidence of such proceedings. The same view has been taken by the courts in Belgium. For instance, in a recent case the question was raised with regard to the interpretation of Article 448 of the Belgian Penal Code which penalizes public injury by gestures or words. The Court of Appeal of Liege distinguished between cases where such offensive acts are done in a public place and cases where such acts are committed in a place which is not public but open to a certain number of persons. It held that in the first case, apart from proving the fact complained of, there was no necessity of

adducing further evidence of the presence of other persons. In the second case, however, they observed that in order to fulfil the requirements of the Article, the presence of two or more persons was necessary. This distinction was made on the basis of evidence furnished by *travaux préparatoires* (*Public Prosecutor and L. . . v. G. . .*, 1953. *Pasicrisie*, I.I. at p. 14.) The same rule is followed in Italy. Thus, in *Amministrazione Finanze v. Società Anonima Immobiliare*, 1953. *Giur. it.*, I.I.763 where the question was raised with regard to the interpretation of Article 2704 of the Civil Code, reference was made by the Supreme Court to the *lavori preparatori* of the Civil Code of 1865. But neither in France nor in Italy conclusive weight is attached to *travaux préparatoires*. Therefore, in *Morini Battista v. Province of Bologna*, 1953. *Giur. it.*, III.17, where the question was raised with regard to the interpretation of the Statute of the 10th April, 1951, the Court refused to accept the evidence of *lavori preparatori* as conclusive, observing that it is erroneous to identify the will of a greater or smaller number of parliamentary members with the will of the legislature.

Where the text is obscure or ambiguous, it is also permissible according to the accepted rule of jurisprudence to resort to contemporaneous circumstances such as the conditions under which the text was enacted, the state of the law at the time of the enactment, the evils which the enactment was intended to remedy and other extraneous considerations. The rule was thus laid down by the Supreme Court of the United States in *General Broadcasting System v. Bridgeport Broadcasting Station*, 53 Fed. (2) 664: "It is a well-established rule of statutory construction that to determine the legislative intent, the Court may take into consideration the conditions existing at the time of the legislation in question, upon which the legislation was intended to operate." The same view was taken by the Indian Supreme Court in *Kathi Rannig v. State of Saurashtra*, (1953) S.C.R. 435, in order to ascertain the precise circumstances under which the Ordinance creating special courts was brought into force. On the same ground it is permissible to refer to the general history of a statute as an intrinsic aid to interpretation. See *Harak Singh v. Kailash Singh*, A.I.R. (1958) Pat. 581. Thus, in *People v. Odierno*, a case cited by Crawford (op. cit. p. 386) the American Court referred to the history of the enactment in order to ascertain the intent of the legislature. Another illustration of the rule is furnished by the decision of the American Supreme Court in *United States v. Raynor*, 302 U.S. 540. There the question was raised with regard to the interpretation of a statute under

which the possession of paper similar to that used by the Government in printing its currency notes constituted a criminal offence. The Supreme Court referred to the history of the legislation and observed as follows: "The section now under consideration is plainly a culmination of a long series of legislative acts, each of which has declared it to be a crime to have possession of paper counterfeiting the distinctive paper, and suitable to be made into counterfeit obligation. Each change since 1835 was intended to make the possession of counterfeit paper more dangerous for counterfeiters."

On similar grounds it has been held that it is permissible to refer to *contemporanea expositio* or the interpretation placed upon a statute by the authorities at the time of its enactment or soon thereafter. Such contemporaneous interpretation extends to that of executive authorities. Thus, in *Ernst v. Kootros*, 196 Wash. 138, the Court observed as follows: "Because of the construction constantly given this statute by the administrative officers whose duty it is, and has always been, to enforce it; because of the repeated re-enactments of the original act without change; and because of the judicial sanction given to it, the construction put upon it should not be overturned now so as to affect past transactions unless manifestly wrong."

Retrospective Operation: the Rule of Roman Law. Another important problem of interpretation relates to the temporal ambit of the operation of the Constitution. Article 394 expressly provides that "this Article and Articles 5, 6, 7, 8, 9, 60, 324, 366, 367, 379, 380, 388, 391, 392 and 393 shall come into force at once, and the remaining provisions of this Constitution shall come into force on the twenty-sixth day of January, 1950, which day is referred to in this Constitution as the commencement of this Constitution." This provision does not, however, offer any solution to the many issues which arise in this connexion. The classical jurists of Roman Law, which is the source of all rules which have been adopted in the jurisprudence of almost all modern States, divide facts of legal import into three categories from the point of view of the temporal operation of a constitution or statute. These are:—(i) *facta praeterita*, i.e. facts which arose and were concluded or transactions which were completed before the commencement of a constitution or statute; (ii) *facta futura*, i.e. facts which arise or transactions which are initiated after the coming into force of a constitution or statute; and (iii) *facta pendentia*, i.e. facts which arose but were not concluded or transactions which were begun but not closed before the commencement of a constitution or statute.

Following this classification, the rule of Roman Law lays down: "*Leges et constitutiones futuris certum est dare formam negotiis non ad facta præterita revocari; nisi nominatim et de præterito tempore et adhuc pendentibus negotiis cautum sit.*" The rule is clearly based upon three principles: the first is that a new statute or constitution does not operate so as to affect *facta præterita*. Secondly, a new statute or constitution has retrospective operation and affects *facta præterita* if there is an express provision to this effect. Thirdly, *facta pendentia* come within the operation of a new statute or constitution.

The Rule of the Common Law. Generally speaking, English Courts have adopted the rule of Roman Law. The following principles may be deduced from these decisions. The first is the principle of vested rights. As Willis, J. pointed out in *Phillips v. Eyre*, (1870) L.R. 6 Q.B. 1, "retrospective laws are, no doubt, *prima facie* of questionable policy, and contrary to the general principles that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law." In other words, as clarified by Wright, J. in *In re Athlumney*, (1898) 2 Q.B. 551, "a retrospective operation is not to be given to a statute so as to impair an existing right or obligation." Craies has, therefore, rightly pointed out that "a statute is deemed to be retrospective, which takes away or impairs any vested right acquired under an existing law, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed."¹ The only exception to this rule is that vested rights do not include procedural rights. The second principle is that retrospective force may be ascribed to new statutes or constitutions if from express words or by necessary implications it appears that such was the intention of the legislature. Therefore, retrospective operation must be given to a statute if that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, no retrospective operation can be attributed to the statute. Thirdly, the rule against retrospective operation may be abrogated in public interest. To use the words of Willis, J. in *Phillips v. Eyre*, "allowing the general inexpediency of retrospective legislation, it cannot be pronounced naturally or necessarily unjust.

¹ Craies, *Statute Law*, p. 357.

There may be occasions and circumstances involving the safety of the State, or even the conduct of individual subjects, the justice of which prospective laws made for ordinary occasions and usual exigencies of society for want of pre-vision fail to meet, and in which the execution of the law as it stood at the time may involve practical public inconvenience, *summum jus summa injuria*." -

The same view has been taken by the Courts in the United States. Thus, in *People v. Dilliard*, 298 N.Y.S. 296, it was laid down as follows: "It is chiefly where the enactment would prejudicially affect vested rights, or the legal character of past transactions, that the rule in question applies. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or consideration already passed, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation." Secondly, American Courts have also held that considerations of public good and public justice are sufficient reasons for maintaining the retrospective character of statutes even if they impair or affect vested rights. Thus, in *Town of Goshen v. Inhabitants of Stonington*, 4 Conn. 209, it was observed that "laws of a retroactive nature, affecting the rights of individuals, not adverse to equitable principles, and highly promotive of the general good, have so far been passed, and as often approved I very much question whether there is an existing government in which laws of retroactive nature and effect, impairing vested rights, but promotive of justice and the general good, have not been passed. In England, such laws frequently have been passed." The same view has been taken by the Courts in India. In *Rustomji v. Bai Moti*, A.I.R. (1940) Bom. 90, Beaumont, C. J. expressed his view as follows: "No doubt the general principle is that Acts of the Legislature are not given retrospective effect unless the language makes it clear that such was the intention, but I apprehend that in applying that principle one must have regard to the general character of the Act in question, and when construing an Act introduced for the purpose of applying an equitable doctrine to certain transactions considered *ex hypothesi* to be lacking in equity one should not assume that the Legislature intended that the Act should not have retrospective effect, but wishes to preserve rights acquired in such transactions."

The Rule of Continental Jurisprudence. The same basic principles are to be found in the continental legal systems. For

instance, Article 2 of the Civil Code of France expressly lays down that "a statute provides only for the future and has no retroactive effect." Recent decisions of the French Courts have, however, considerably modified the application of the rule against retroactivity. In the first place, it has been laid down that "a new statute governs, in principle, circumstances established and legal relations formed before its promulgation." (*Martinaud v. Venne Bernard*, 1932. Dalloz. 1. 18.) Secondly, the application of this principle is excluded and the rule against retroactivity formulated in Article 2 of the Civil Code comes into play where the new statute impairs or affects rights acquired under the authority of the previous statute. It will be seen that this rule corresponds to the rule of vested rights under the common law. French Courts have, however, distinguished between *droits acquis* (vested rights) and *les simples expectatives* (rights in expectancy), and *droits acquis* have been defined as rights acquired for the benefit of a person which are founded upon a legal title, either contractual or judicial. Thus, in *Jobelot v. Société des Automobiles Delahaye*, 1932. Sirey. 1. 129, where the plaintiff had entered the services of the defendant company under a contract of employment for an unspecified period and the contract contained a clause fixing a term of notice less than that allowed by local usage, it was held that the statute of 19th July, 1928, under which such a clause was null and void, was applicable on the ground that "the law did not confer any definitely vested right on the parties to the application of a clause which the Legislature, for reasons of social interest and protection of labour, has declared unlawful." The Court, therefore, held that the clause in the contract of employment was invalid. Thirdly, the French Courts have also held that there can be no *droits acquis* against "public order". They have, therefore, generally followed the principle that in public interest and for common benefit, the rule against retrospective operation may be disregarded. This principle has been clearly established by a series of decisions of the *Cour de Cassation*, a striking instance of which is furnished by *De-Delattre v. Scouteten*, 1873. Sirey. 1. 37. In that case the plaintiffs had engaged themselves to discharge their contractual obligation either in gold or silver and in no other form of currency. When the statute of the 12th August, 1870 was enacted making paper money compulsory legal tender, the plaintiffs claimed that in view of the statutory provision their stipulation to discharge their debt in gold or silver had become null and void. This contention was not accepted by the lower courts,

but on final appeal it was upheld by the Supreme Court (*Cour de Cassation*). In the course of their judgement, the Court observed as follows: "Monetary laws which prescribe paper money as compulsory legal tender with a view to averting an imminent crisis, partake of the character of laws of police and security; and on this ground they undoubtedly concern public order and, therefore, fall within the category of laws which cannot be derogated from by specific agreement under Article 6 of the Civil Code . . . In effect, by imposing on individuals, in absolute terms and without admitting any exception, the obligation to accept as legal currency the notes of the Bank of France, the statute has sufficiently indicated that its provisions extend to those who, before the promulgation of the statute, had stipulated that their claims could only be discharged in gold or silver. No doubt, the stipulation is valid and binding on the debtor, in the absence, or after the abrogation, of the laws prescribing a compulsory legal tender, but it ceases to be enforceable from the moment the legislature has established the compulsory legal tender, and as long as this measure remains in force, the creditor cannot legally refuse to accept in payment paper currency to which the law has attributed obligatory value equal to that of the metallic currency." The same view was taken by the Court in *Pelissier du Besset v. the Algiers Land & Warehouse Co., Ltd.*, 1927. Sirey. 1. 289.

The Rule of Italian Law and its Application to the Constitution of 1948. Recent decisions of Italian courts throw considerable light on the problem of retrospective operation of statutes and constitutions. Article 11 of the Preliminary Provisions of the Civil Code of Italy expressly embodies the rule against retroactivity. This has been construed by the Constitutional Court to mean that a new law cannot affect past situations or events; it cannot govern the past, but may affect the present or the future. Thus, in a case where the statute prescribed that the assessment of compensation for expropriation should be based on criteria laid down in a previous statute, it was held by the Constitutional Court that the question of retroactivity did not arise as the statute in question referred to declarations and assessments of value completed in the past and to legal consequences arising therefrom, but not for the purpose of affecting them *de novo* and in a different manner. (*Romanazzi v. Puglia & Lucania*, Giur. cost. 1957. p. 754). It has also been held that the principle of irretroactivity of statutes is not an absolute rule and must give way to the opposite principle of retroactivity under certain circumstances,

particularly in the field of public law. (*Zonghilotti v. Zonghilotti*, Foro Padano: 1948. N. 4, p. 257). As regards the operation of the Constitution, the distinction between mandatory and directive provisions has not been accepted by the Constitutional Court. In its view the general rule is that all constitutional provisions are applicable on and from the date on which the Constitution came into force. Thus, in the case of *In re Enzo Cattani & others* (Judgements of the Italian Constitutional Court. 1956. Vol I., Judgement No. 1), where the question was whether Section 113 of the Law of Public Security contravened Article 21 of the Constitution, the Court made the following pertinent observations: "The plea that the new principle of constitutional validity is applicable only to laws promulgated after the Constitution and not to anterior laws cannot be accepted, since from the textual point of view, Article 134 of the Constitution as well as Section 1 of the Constitutional law of the 9th February, 1948, speak of the constitutional validity of laws without making any distinction. Further, from the logical point of view, it cannot be denied that the relation between ordinary laws and constitutional laws is the same whether such ordinary laws are previous or subsequent to constitutional laws. In one case, as in the other, constitutional laws by their intrinsic character under a system of rigid constitution must prevail over ordinary laws. . . . Discussions have mainly revolved round the question whether the principle laid down in the last article (Article 21) might be held to be one of immediate application or of a directive character. . . . The distinction between mandatory and directive rules may be the determining factor in deciding the question of repeal or otherwise of a statute, but has no such effect on the decision of the question of constitutional validity of a statute, and in certain cases a statute may be constitutionally invalid if inconsistent with rules which are of a directive character." The Court, therefore, held that Article 21 of the Constitution was immediately applicable and quashed the proceedings started against the accused under Section 113 of the Law of Public Security. This view was endorsed by the Court in the subsequent case of *In re Bruno Micheli & others* (op. cit., Judgement No. II). From the foregoing discussion it would be perfectly clear that, according to the authoritative decisions of the Italian Constitutional Court, the provisions of the Constitution of 1948 are applicable on and from the date on which it came into force, and affect and control laws enacted prior to that date or after the promulgation of the Constitution. It is also clear that according to

this view the question of retrospective operation of the Constitution does not arise.

The Rule of Latin American Law. Generally speaking, the jurisprudence of the Latin American States is founded upon the system of continental Europe. The rule in respect of retrospective operation of statutes presents no exception. For instance, Article 3 of the Argentine Civil Code, following the provisions of the French Code, lays down as follows: "Laws provide for the future, they have no retrospective effect, nor can they alter acquired rights." This has been interpreted to mean that "in a conflict between two laws which deal with the same question the old law governs the past and the new law governs the future." (*In re David Julian Gomez Pombo*, Fallos 229, p. 202). As we have seen, this is also the rule of other legal systems. Secondly, as in France, the law of Argentina makes a distinction between expectant rights and acquired rights. Article 4044 of the Civil Code provides: "The new law must be applied to anterior facts when they deprive individuals of rights which are mere rights in expectation; but cannot be applied to anterior facts, when they destroy or alter vested rights." Thirdly, as in France and Italy, the law of Argentina recognizes that there are no vested rights against laws of public order. (*In re Sebastian H. Roa & others*, Fallos 226, p. 651). Similarly, it has been held by the Supreme Court of Mexico that there is no question of retrospective operation where a statute impairs a right which is in conflict with public interest. (Jur. sup. No. 922, p. 1718). Further, it should also be remembered that the Argentine Constitution of 1949 expressly provided that "the permanent penal law most favourable to the accused shall always be applied even with retrospective effect." It would thus be evident that under the law of Argentina the rule against retrospective operation is not of an absolute character. It is true that under Article 14 of the Mexican Constitution the prohibition against retrospective operation of all statutes is absolute, but that prohibition only applies where the statute causes "*perjuicio de persona alguna*". It has, therefore, been held that retrospective operation may be attributed to a statute where it does not cause any damage. (Jur. sup. No. 923, p. 1720). The same general principles have been followed in the interpretation of constitutional laws. Thus, in a recent case, *In re Smoot*, 59 Sem. jud., 5 Epoca, II. 3948, the question was raised as to the effect of Article 27 of the Mexican Constitution of July, 1917 on the acquisition of immovable properties by foreigners in Mexico. There an American

national had acquired landed properties in Mexico before the Constitution came into force, but as Article 27 did not permit any acquisition of immovable property by foreigners in the prohibited zone, proceedings were instituted for the compulsory acquisition of the properties in question. It was contended on behalf of the foreigner that the Constitution could not, in the absence of express provisions, extinguish the rights which had already been acquired by him. This contention was accepted by the Supreme Court which observed as follows: "A foreigner who has acquired real estate in the prohibited zone before the Constitution of 1917 came into force enjoys the protection of the law. . . . The Constitution of 1917 does not establish with retrospective effect a prohibition upon foreigners who acquire property along the frontier. . . . It has been said that the provision of Article 27, Para. 1 of the Constitution, according to its grammatical interpretation, was not enacted with retrospective effect. To this it should be added that the Constitution, if it had the intention to give retrospective effect to that provision, would not have failed to provide for the legal position of private acquisition." In other words, it is clear that according to the law of Mexico the Constitution cannot have retrospective operation in the absence of express provision to that effect. On the other hand, it is generally held that all constitutional provisions are immediately applicable. Thus, in *S. A. Commercial Staudt Y Cia v. Emilio Padua Y Altros*, Fallos 229, p. 368, the Supreme Court of Argentina has laid down the rule as follows: "The Articles of the National Constitution prescribe that the exercise of one's rights to the prejudice of the community or unjust detriment of fellow citizens is an abuse of right—Article 35; that private property has to fulfil a social function—Article 38; that capital must conform to the object of social well-being—Article 39; that private initiative for voracious increase of profits is equally prohibited—Article 40; these Articles introduce overriding directives for the interpretation of the positive laws in force, from the date of the sanction of the Constitution of 1949, so that the judicial tribunals cannot disregard them." Similarly in *In re S.A. Neumaticos Good Year v. Domingo Hector Bonafina*, Fallos 229, p. 456, the Supreme Court of Argentina observed that "all laws in force including the general and procedural laws must be interpreted in the light of the new constitutional principles and in accordance with them."

The Rule in Keshavan Madhava Menon v. State of Bombay.
It is now necessary to examine the view taken by the Supreme Court of

India in regard to this important question. It was raised for the first time in *Keshavan Madhava Menon v. State of Bombay*, A.I.R. (1951) S.C. 128. In that case proceedings had been started against the appellant for an offence punishable under Section 18 (1) of the Indian Press (Emergency Powers) Act in respect of a pamphlet published in 1949. It was during the pendency of these proceedings that the Indian Constitution came into force. It was, therefore, contended by the appellant that as the relevant provisions of the Act were inconsistent with the fundamental rights conferred by the Constitution, they became void under Article 13 (1) of the Constitution after its commencement on the 25th January, 1950 and, consequently, the proceedings initiated against him could not be continued as they were contrary to the Constitution. The High Court of Bombay did not examine the contention as to whether Section 18 of the Act was void under the Indian Constitution but proceeded on the assumption that this contention of the appellant was valid. The Court, however, held that the question was governed by Section 6 of the General Clauses Act, 1897, and, therefore, the contention urged by the appellant could not be sustained. Chagla, G. J. observed as follows: "When an Act is repealed and ceases to be of any effect, ordinarily the vested rights which have come into existence under the repealed Act and anything done or any proceedings taken come to an end with the repealing of the Statute. In order to save vested rights and in order not to affect what was done under an Act, in England Section 32 (2), Interpretation Act, 1889 was enacted which expressly saved the previous operation of the repealed enactment on anything done or suffered under it and any legal proceeding which was pending under the Act. Similarly, in India we have Section 6, General Clauses Act, 1897, which is practically identical in terms of the section I have just referred to of the Interpretation Act." He further held that "in the circumstances and in its effect there is no difference between an Act which is repealed and an Act which is declared void. In both cases the Act ceases to be operative. The law is annulled." This is perfectly true, but the learned judge fails to appreciate the fact that certain special consequences follow from the repeal of an Act by virtue of express statutory provisions, and these cannot be attributed to the avoidance of legislation on the ground of constitutional invalidity.

On appeal, the Supreme Court by a majority upheld the decision of the Bombay High Court, although they did not specifically accept

Chagla, C. J.'s argument that the matter was governed by Section 6 of the General Clauses Act, 1897. Das, J., delivering the judgement of the majority, thus stated the law: "Every statute is *prima facie* prospective unless it is expressly or by necessary implications made to have a retrospective operation. There is no reason why this rule of interpretation should not be applied for the purpose of interpreting our Constitution. We find nothing in the language of Article 13 (1) which may be read as indicating an intention to give the retrospective operation. On the contrary, the language clearly points the other way. The provisions of Part III guarantee what are called fundamental rights. . . . These rights are given for the first time by and under our Constitution. Before the Constitution came into force there was no such thing as fundamental rights. What Article 13 (1) provides is that all existing laws which clash with the exercise of fundamental rights (which are for the first time created by the Constitution) shall to that extent be void. As the fundamental rights became operative only on and from the date of the Constitution the question of the inconsistency of the existing laws with those rights must necessarily arise on and from the date those rights came into being. It must follow, therefore, that Article 13 (1) can have no retrospective effect but is wholly prospective in its operation." From this statement three principles may be deduced. In the first place, Article 13 (1) of the Constitution has no retrospective effect and does not, therefore, affect any *facta praeterita*. Secondly, all *facta futura* are governed by the provisions of the Article. Thirdly, *facta pendentia* fall outside the ambit of its operation.

Criticisms of the Views of the Supreme Court. It would be obvious that the first rule laid down by the Supreme Court is in accord with the principles of other legal systems we have discussed above. Difficulties, however, arise with regard to the second and third principles enunciated by the Supreme Court. Is it correct to assert that the Constitution is wholly prospective? Cannot the Constitution have any effect on any *facta pendentia* under certain circumstances? The answer provided by the Supreme Court is clearly and emphatically in the negative, and it is, therefore, necessary to examine the basis of the decision of the majority of the Supreme Court. The first argument in support of the decision may be thus stated in the words of Das, J.: "Article 372 (2) gives power to the President to adopt and modify existing laws by way of repeal or amendment. There is nothing to prevent the President, in the exercise of the powers

conferred on him by that article, from repealing, say, the whole or any part of the Press (Emergency Powers) Act, 1931. If the President does so, then such repeal will at once attract Section 6, General Clauses Act. In such a situation all prosecutions under the Press (Emergency Powers) Act 1931, which were pending at the date of its repeal by the President, would be saved and must be proceeded with notwithstanding the repeal of that Act unless an express provision was otherwise made in the repealing Act. It is, therefore, clear that the idea of the preservation of past inchoate rights or liabilities and pending proceedings to enforce the same is not foreign or abhorrent to the Constitution of India." Mahajan, J. endorsed the argument as follows: "Reference in this connection may be made to the provisions of Article 372(2) of the Constitution. Under this article the President has been given power to adopt existing laws and to bring them in accordance with the articles of the Constitution by a process of amendment, repeal or adaptation. The President could have repealed the Press (Emergency Powers) Act and brought the law in accordance with the provisions of Part III of the Constitution and if he had used the powers of repeal given to him by this article the provisions of the General Clauses Act would have been immediately attracted to that situation and the pending prosecution of the appellant would have to be continued in view of those provisions. If in that situation the Constitution contemplates the continuance of pending proceedings under the existing law, it becomes difficult to place a different interpretation on the phraseology employed in Article 13 (1) of the Constitution, than the one that is in accord with that situation."

It is respectfully submitted that on a close and careful scrutiny of the argument it would appear to be fallacious. In the first place, this view of the matter totally ignores the basic fact that Article 372 (2) provides a special machinery and procedure for bringing into accord with the Constitution all existing laws which are inconsistent with any of its provisions. It would, therefore, be clear that this Article comes into operation only when the special procedure has been adopted. The scope of the Article cannot be extended to cover cases where such a procedure has not been followed. Secondly, Article 372(2) is an exception to the general rule embodied in Article 13(1), and according to the established canons of interpretation a proviso or exception cannot be so construed as to override a general provision. This is undoubtedly the rule of the common law as well as of other legal systems. Thus, in *In re Tabrisky*, (1947) Ch. 565. G.A.,

it has been laid down by the Court of Appeal in England that a proviso should not be interpreted so as to have greater effect than the strict construction of the proviso renders necessary. But if we adopt the argument advanced by the learned Judges of the Supreme Court it would undoubtedly mean that the exceptional provision of Article 372(2) would render the general provision of Article 13(1) completely nugatory. In the third place, as we shall see, the Supreme Court itself has laid down in a later case, *Lachhman Das Kewal Ram Ahuja v. State of Bombay*, A.I.R. (1952) S.C. 235, that the rule of *Keshavan Menon's case* is not applicable to procedural rights. If, however, Article 372(2) is to be read as governing Article 13(1), as laid down by the Supreme Court, then there is no justification for excluding the application of the rule to cases of procedural rights. Finally, Article 372 (2) was a temporary provision and ceased to be operative after the expiration of two years from the commencement of the Constitution. It would, therefore, be clear that if the question had come up for decision after the expiry of the stipulated period, the Supreme Court could not have founded their argument on the provision of a dead Article of the Constitution.

The second argument in support of the decision in *Keshavan Menon's case* was thus stated by Mahajan, J.: "In my opinion the rule contained in the General Clauses Act and in the English Interpretation Act is more in consonance with reason and justice and is also a rule of convenience and should be followed in this country, in preference to the rule evolved by the English Judges in the earlier part of English legal history." Das, J., however, expressed a different opinion: "The effect of Article 13(1) is quite different from the effect of the expiry of a temporary Statute or the repeal of a Statute by subsequent Statute." In spite of these statements, however, it is evident that the rule which has been adopted by the majority of the Judges of the Supreme Court is the rule embodied in Section 6 of the General Clauses Act, 1897. References have been made both by Das and Mahajan, JJ. to "the accepted canons of construction of Statutes", but the canon which they have applied is the canon laid down by the Interpretation Act, 1889 and the General Clauses Act, 1897. It should, however, be borne in mind that the provisions of these statutes expressly and specifically refer to repeal of Acts by subsequent Acts. They have no bearing whatsoever in cases where a statute or part of a statute becomes void as being contrary to another statute or part of a statute as, for example, under Section 6 of the Colonial

Laws Validity Act, 1882. In such cases the canons of interpretation prescribed by the General Clauses Act or the Interpretation Act are not applicable, and the rules of the common law exclusively prevail. It would, therefore, appear that the argument advanced by these distinguished Judges of the Supreme Court cannot be sustained. Further, the provisions of the Interpretation Act, 1889, and the General Clauses Act, 1897 have given an exceptional and special meaning to the term "repeal"; and this meaning cannot be assigned to any other term or phraseology. There is no rule of construction which would support the extension of the application of this statutory rule to any other case. Indeed, it is clear from judicial decisions that the rule embodied in the Interpretation Act can only apply in cases where a statute has been repealed by another statute and in no other. It should also be pointed out that the learned Judges of the Supreme Court have failed to appreciate the distinction between the repeal of a statute and the constitutional invalidity of a statute. As the Italian Constitutional Court has pertinently observed: "The two juridical principles of repeal and constitutional invalidity are not identical; they are applicable within different spheres, with diverse effects and with different consequences. Besides, the field of repeal is more restricted in comparison with that of constitutional validity and the conditions necessary for repeal on the ground of inconsistency according to the general principles are more limited than those which are necessary for the determination of the constitutional validity of a statute." [*In re Enzo Cattani & others*, Judgements of the Constitutional Court, (1956) Vol. I, Judgement No. 1.]

It is necessary to examine two other points urged by Das, J. In the first place, he declared that "if it is against the spirit of the Constitution to continue the pending prosecutions under such void law, surely it would be equally repugnant to that spirit that men who have already been convicted under such retrospective law before the Constitution of India came into force should continue to rot in jail." It is difficult to accept this argument. It is a fundamental principle of all systems of jurisprudence that in the absence of express intention, no statute or constitution can affect any transaction or proceedings which have ended in a final and definitive judgement. This is based upon the doctrine of *res judicata*; but surely the same principle cannot apply to proceedings which have not yet terminated in a final judgement. Secondly, Das, J. also asserted that "it would further be seen that Article 13 (1) does not in terms make the

existing laws which are inconsistent with the fundamental rights void *ab initio* or for all purposes. On the contrary, it provides that all existing laws, in so far as they are inconsistent with the fundamental rights, shall be void to the extent of their inconsistency. They are not void for all purposes but they are void only to the extent they come into conflict with the fundamental rights." Here again the argument appears to be fallacious. The learned judge fails to distinguish between the *extent* to which an existing law becomes void and the *purpose* for which it becomes void. Article 13 (1) does not anywhere refer to the purpose for which an existing law becomes void; it merely refers to the extent to which an existing law is void under the Constitution. It is, therefore, clear that once an existing law has been declared to be void as being contrary to a provision of the Constitution it is void for all purposes; and a suitor who is entitled to claim any of the fundamental rights is competent to contend that a law is void because it contravenes a provision of Part III of the Constitution. Indeed, this view of the matter finds support in the judgement of Chagla, C. J. in *Yusuf Abdul Aziz v. The State*, A. I. R. 1951, Bom. 470. In fact, no other meaning could be given to the word "void" in Article 13 (1).

The Rule in *Lachhman Das Kewal Ram Ahuja v. State of Bombay*. The foregoing discussion makes it clear that there is really no satisfactory basis for the decision of the majority of the Supreme Court in *Keshavan Madhava Menon's case*. Indeed, the effect of that decision has been substantially whittled down by the judgement of the same court in *Lachhman Das Kewal Ram Ahuja v. State of Bombay*, A. I. R. (1952) S. C. 235. In that case the question was raised as to whether the rule against retroactivity of the Constitution was applicable to procedural rights. We have already seen that the majority of the Judges of the Supreme Court were definitely against the application of the common law rule regarding retrospective operation of Article 13 (1) of the Constitution. They, therefore, followed in effect although not expressly the rule embodied in Section 6 of the General Clauses Act, 1897. In the present case, however, the doctrine of *Keshavan Madhava Menon's case* was thrown overboard and the rule of the common law was resorted to in determining the issue. This is clear from the judgement of Patanjali Sastri, C. J. who did not endorse the view of the majority of the Court. He said: "The alternative courses open to the Court would, therefore, seem to be either to hold that Article 13 (1), read with Article 14, does not affect pending trials

even in respect of procedural matters, as it has been held not to affect such trials in respect of substantive rights and liabilities accrued before the date of the Constitution in *Keshavan Madhava Menon's case*, 1951 S. C. R. 228, or to go back on that decision and give those provisions of the Constitution retrospective effect." Das, J. did not, however, refer to the rule embodied in Section 6 of the General Clauses Act, 1897 and relied entirely on Maxwell's statement of the rule of the common law that "no person has a right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the court in which he sues, and, if an Act of Parliament alters that mode of procedure, he has no other right than to proceed according to the altered mode."

This decision is undoubtedly correct as it is not only in accord with the rule of the common law but also conforms to the principle which has been adopted in almost all other legal systems. For instance, the case of *Palumbo v. Societa Anonima Andre*, Giur. it., 1937. 1. p. 123, decided by the Italian Supreme Court (*Corte di Cassazione*) furnishes an interesting instance in point. There the question was raised as to whether the Geneva Protocol of 1923 governed a contract entered into between the parties in 1916. Although the case dealt with the interpretation of a treaty, the Supreme Court laid down the general principle that the rule against retroactivity of statutes does not apply to procedural rights. The Court observed as follows: "If procedural laws apply immediately (it would be incorrect to say that their effect is retrospective, for, like any other rule of law, procedural laws provide only for the future), they must be applied in all situations which arise after their coming into operation. In the domain of procedural laws the term 'situation' must be understood to mean procedural situations, i.e. procedural relations, and not relations of substantive law. Applying this rule, if the procedural relation is not yet extinguished, it must be governed by the law in force at the time of the trial."

The Principles of the Two Decisions. The net results of these two decisions of the Indian Supreme Court may be thus summarized. In the first place, *Keshavan Madhava Menon's case* lays down that the question of the temporal operation of the Constitution is governed by the principle embodied in Section 6, General Clauses Act, 1897; in other words, the provisions of the Constitution do not affect the previous operation of any enactment repugnant to its provisions, or any right, privilege, obligation or liability acquired, accrued or

incurred under any such enactment or affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment in respect of any offence committed against any such enactment or the continuation or enforcement of any such investigation or legal proceeding. Secondly, the provisions of the Constitution do, however, affect any legal proceeding in so far as procedural rights are concerned. The position was thus explained by Das, J. in *Ahuja's case*: "While on and after the commencement of the Constitution no existing law could, by reason of Article 13(1), be permitted to stand in the way of the exercise of any of the fundamental rights, that Article could not be read as wiping out the inconsistent law altogether from the Statute Book and as obliterating its entire operation on past transactions, for to do so would be to give it retrospective effect which it did not possess. Such law, it was held, existed for all past transactions and for the enforcement of rights and liabilities accrued before the date of the Constitution. . . . The observations made in that case related to the substantive rights accrued or liabilities incurred under the Act before the Constitution came into force." He, therefore, held that the rule of *Keshavan Madhava Menon's case* did not apply to cases relating to procedural rights. He further observed: "If in the absence of any special provision to the contrary no person has a vested right in procedure, it must follow as a corollary that nobody has a vested liability in matters of procedure in the absence of any special provision to the contrary."

Criticisms and Conclusions. This statement of the law does, no doubt, bring the two decisions of the Supreme Court within the ambit of the rules adopted in all systems of jurisprudence. The actual decision in *Keshavan Madhava Menon's case* is, however, open to two serious objections. In the first place, as we have seen, the generally accepted canon of interpretation is that the question whether or not a statute has retrospective effect depends on the "dominant intention" of the statute. The question, therefore, arises what is the clear and specific intention of Article 13 (1) of the Constitution. The Article reads as follows: "All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part shall, to the extent of such inconsistency, be void." According to its generally accepted meaning, the term "void" is equivalent to "null and void, ineffectual, nugatory, having no legal force or binding effect, and

unable in law to support the purpose for which it was intended." (See the judgement of Fazl Ali, J. in *Keshavan Madhava Menon's case*, citing Black's *Law Dictionary*.) According to the *Shorter Oxford Dictionary*, the word "void" means "having no legal force; legally null, invalid or ineffectual". Therefore, it would be clear that under the Article an inconsistent law has no legal force or binding effect. But the main point is when does this effect of Article 13(1) come into operation. The Article does not lay down any specific date; nor does it say that such an effect will come into operation *in futuro*. On the other hand, the rule contained in this Article is mandatory and must, therefore, mean that the operation of the Article begins as soon as the Constitution comes into force. There can be no other meaning of the words "shall be void"; they can only be construed to mean "shall be void as soon as the Constitution comes into force." To give any other meanings to these words would be to ignore the dominant intention of the Article. If this interpretation of the Article be correct, then it must be held that although the Constitution may not have any retrospective effect, it must have an immediate effect on and from the date it came into operation. As we have seen, this is also the view of all other systems of jurisprudence. Reference has already been made to the views expressed by the Italian Constitutional Court. An exactly similar view has been taken by the Federal Tribunal of Switzerland. Thus, the Tribunal has held that having regard to Article 2 of the transitional provisions of the Constitution (which corresponds to Article 13 (1) of the Indian Constitution), the provisions of all cantonal laws which are in conflict not only with the Federal Constitution but also with the decisions of the Federal Court pronounced in conformity with the principles of the Federal Constitution must be deemed to have been deprived of all legal effect as soon as the Constitution came into force (*Arretes de Tribunal Fédéral*, XV, No. 27. See also the decision of the Federal Assembly of the 4th September, 1875). Similarly in a case where the question was raised with regard to the effect of Article 54 of the Federal Constitution it was categorically laid down by the Federal Council that Article 54 came into force on the 29th May, 1874, i.e. the date of the commencement of the Constitution and on and from that date the various provisions of that Article became exclusively and uniformly applicable within the territories of Switzerland as well as outside the territories in respect of Swiss citizens. They also clearly laid down that the provisions of cantonal constitutions and laws which were contrary to

the Federal Constitution became null and void on and from the 29th of May by virtue of Article 2 of the transitional provisions of the Federal Constitution. If this be the correct interpretation, then the decision of the Supreme Court in *Keshavan Madhava Menon's case* has no logical or legal foundation.

Secondly, even if we accept the interpretation placed upon the decision in *Keshavan Madhava Menon's case* by Das, J. and disregard the arguments which were advanced by the judges in support of that decision, the fact remains that the actual decision in *Keshavan Madhava Menon's case* violates the basic principles of criminal jurisprudence adopted by all legal systems. In that case it was held by the majority of the Supreme Court that criminal proceedings could be continued under the Constitution against a person who had infringed the provisions of an Act which had become void on account of inconsistency with the Constitution; in other words, it means that a person could be convicted for an offence under an Act which had ceased to be valid. This decision, therefore, contravenes one of the two fundamental principles of criminal law. The first is: *nullum crimen sine lege*. This has been incorporated in Article 20(1) of the Indian Constitution which reads as follows: "No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence." The second principle is a corollary of this rule: *nulla poena sine lege*, i.e. no person can be convicted except under a valid and subsisting law. These two rules derived from Roman Law are an integral part of every system of jurisprudence. The maxim *nulla poena sine lege* is also a basic principle of English criminal jurisprudence. Thus, Hawkins in his *Pleas of the Crown* observes that when a new law repeals the law creating an offence, or substitutes a mitigated punishment, the offender cannot be punished in respect of the former law. Crawford cites the case of *Cleveland, etc. Railway Co. v. Mumford*, 197 N.E. 826, and observes as follows: "There can be no legal conviction for an offence, unless the act is contrary to law at the time it is committed; nor can there be a judgement, unless the law is in force at the time of the indictment and judgement." The same rule underlies the decision in *R. v. Swan*, (1949), 4 Cox. C. C. 108 where it was held that if a statute creating an offence is repealed a person cannot afterwards be charged for an offence within it committed while it was in operation. The same maxim of criminal jurisprudence underlies the rule that if a

temporary Act has expired no proceedings can be taken upon it, and it ceases to have any further effect. Craies thus states the rule: "Offences committed against temporary Acts must be prosecuted and punished before the Act expires, and as soon as the Act expires any proceedings which are being taken against a person will *ipso facto* terminate."

The same rule has been universally adopted on the continent of Europe. For instance, Article 2 of the Italian Penal Code expressly provides that "no one shall be punished for an act which, according to the law of the time when it was committed, did not constitute an offence. Nor can he be punished for an act which, according to subsequent law, does not constitute an offence." The same view has been held by French jurists and tribunals. Thus Garraud points out that if before the promulgation of a new law there is a revocable judgement, the condemnation must be quashed by the appellate tribunal when the act has ceased to be an offence or the penalty reduced where such is the provision of a subsequent statute.¹ (See also the decision of the French Supreme Court, *Cour de Cassation*, dated 14th January, 1867. *Sirey*, 76. 1. 433) Similarly, Article 22 of the German Penal Code provided that in case of amendment of the law between the time of the commission of the offence and the date when the judgement is delivered, the provision of the law most favourable to the accused must be applied. Article 2 of the Penal Code of Belgium reproduces Article 4 of the French Penal Code and adds a similar provision in favour of the accused. To the same effect is Article 7 of the Penal Code of Holland.

The point is made clear beyond doubt by a decision of the Swiss Council of State in a case in which the facts were exactly similar to those in *Keshavan Madhava Menon's case*. There the question was raised as to whether a person who had infringed a law which was contrary to the Constitution of 1874 could be prosecuted and punished after the Constitution had come into force. Article 2 of the transitory provisions of the Swiss Constitution of 1784 reads as follows: "The provisions of federal laws and of cantonal concordats, constitutions or laws, which are contrary to this Constitution, cease to have effect by the adoption of the Constitution or the publication of the laws for which it provides." It will be noticed that the effect of this provision is analogous to that of Article 13 (1) of the Indian Constitution.

¹ *Traité théorique et pratique du droit pénal français*, Vol. I., p. 327.

In that case the petitioner was convicted by the Court of first instance for an offence under Article 346 of the Penal Code of the Canton of Freiburg on the 14th April, 1874, i.e. before the Constitution of 1874 came into force. This decision was upheld by the Court of Cassation of the Canton on the 16th July, 1874, i.e. after the Constitution had come into force on the 19th May, 1874. The petitioner appealed against the decision to the Federal Council on the ground that he had been convicted for the offence of sacrilege which could not subsist having regard to Article 49 of the Federal Constitution of 1874. The Federal Council held that the judgement in the case had not become final and definitive till after the Constitution came into operation and, therefore, the principles of the Constitution were in force at the time when the final judgement was pronounced. It was, therefore, open to the Council to examine the case on its merits. The Council, however, held that the matter did not relate to freedom of religion and religious practice and there was, therefore, no contravention of Article 49 of the Constitution. This decision was, on further appeal, reversed by the Federal Assembly. They held that Article 346 of the Penal Code of Freiburg was inconsistent with Article 49 of the Federal Constitution, and, therefore, the conviction of the petitioner could not be upheld. Two important conclusions may be drawn from this judgement. The first is that the provisions of the Federal Constitution came into force with immediate effect and all laws inconsistent with them became null and void. Secondly, penal proceedings instituted before the coming into operation of the Constitution could not be continued under a provision of a law which had become void on account of its inconsistency. The same principle of criminal jurisprudence is implicit in Article 2 of the Spanish Penal Code. It has, therefore, been laid down by the Supreme Court of Spain that "by virtue of the principle of *nullum crimen, nulla poena sine lege* which underlies our positive legislation... no act or omission can be punished, however anti-juridical it may be, so long as it does not constitute a crime laid down by the legislature." (*Fiscal v. Samper*, 130 *Jurisprudencia Criminal*, 694). It would, therefore, be abundantly clear that the actual decision of the Supreme Court in *Keshavan Menon's case* is diametrically opposed to the basic principles of criminal jurisprudence accepted by all civilized States.

To sum up. The wording of Article 13 (1) of the Indian Constitution as well as the canons of interpretation accepted by all systems

of jurisprudence inevitably lead us to the following conclusions. In the first place, the Articles of the Constitution have no retrospective effect in the absence of express provisions to the contrary or unless such effect is attributable by necessary implication. Secondly, the rule against retrospective operation applies only to cases of (a) final and definitive judgements, (b) closed and completed transactions, and (c) vested rights and obligations. Further, in particular, the rule does not apply to cases of procedural rights; nor is it applicable to cases of criminal offences, because the State is not deemed to have any vested rights in respect of criminal prosecution. Thirdly, the provisions of the Constitution came into force with immediate effect on the 26th January, 1950, apart from the provisions which began to operate earlier under the Article 394. Fourthly, subject to the rule against retrospective operation, all laws in force at the time of the commencement of the Constitution, which were inconsistent with any of its provisions, became null and void with effect from the date of the commencement of the Constitution. In other words, such laws became unenforceable and no proceedings could be continued or initiated for the purpose of enforcing any such laws.

Constitutional and Statutory Interpretation. Many judgements of the Indian Courts, particularly of the High Courts of the States, indicate a marked tendency on their part to adopt too strict and rigid an interpretation of the Constitution. It is true that under Article 364, the interpretation of the Constitution is governed by the General Clauses Act, 1897; and to this extent it may be contended that the Constitution has been assimilated to the status of an Act of Parliament. But the fundamental principles of interpretation are not to be found in the General Clauses Act, 1897; and the Constitution must, therefore, be interpreted in accordance with the generally accepted canons of interpretation, particularly those of the common law. It must be remembered in this connexion that the Indian Constitution is not a statute but the sovereign act of the Constituent Assembly, and is, therefore, entitled to claim greater sanctity than an ordinary statute, and has an overriding effect in view of the fact that it is an instrument of government established under the sovereign authority of the Constituent Assembly. This is the rule which obtains in almost all countries governed by written constitutions framed by a Constituent Assembly. It is true that in interpreting the Constitutions of Canada and Australia the rules of statutory interpretation have primarily been adopted; but it must be remembered that both

these Constitutions are statutes of the Parliament of Great Britain. Lefroy, for instance, makes the following observation in respect of the Canadian Constitution: "The British North America Act, although upon it is established the Constitution of a vast Dominion, is, after all, a statute and Courts of law must treat its provisions by the same methods of construction and exposition which they apply to other statutes, no matter how great the constitutional importance of questions which may be raised." He, however, proceeds to add that "a liberal construction must be given to it as a constitutional statute conferring and distributing high and large powers of government, both as to Canada and the Provinces."¹ As regards that Australian Constitution, Quick and Garran point out that "the Constitution of the Commonwealth is enacted as an Act of the Imperial Parliament, and is to be construed in accordance with the rules which regulate the construction of these Acts." They add, however, that though an Act of Parliament, the Australian Constitution is of a very special character, since it is a constitutional charter for a great and self-governing people, "and it is of the most vital importance that it should receive not a narrow and technical, but a broad and liberal construction."² The Judicial Committee of the Privy Council has also emphasized the predominant characteristic of the Commonwealth of Australia Act, 1900 and the British North America Act, 1867 as a "constitutional charter". Thus, for instance, Lord Sankey, L. C. made the following pertinent observation in the case of *In re the Regulation and Control of Aeronautics in Canada*, (1932) A.C. 54: "Great care must, therefore, be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced, especially in the interpretation of an Act such as the British North America Act which was a great constitutional charter, and not to allow general phrases to obscure the overriding object of the Act, which was to establish a system of government upon essentially federal principles." The same view was taken by the Federal Court of India in regard to the interpretation of the Government of India Act, 1935. The rule was thus laid down by Gwyer, C.J.: "The rules which apply to the interpretation of other statutes apply equally to the interpretation of a constitutional enactment subject to this reservation that their application is of necessity conditioned by the subject matter itself. . . . The cardinal rule of interpretation, however,

¹ *Canada's Federal System*, p. 17.

² *The Annotated Constitution of the Australian Commonwealth*, pp. 792-793.

is that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude." (*In re Central Provinces & Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938*, A.I.R. 1939, F.C. 1.)

The position is a little different in the United States of America where the Constitution is not a statute, and it has been held that the Constitution "is intended for the benefit of the people, and must receive a liberal construction. A Constitution is not to receive a technical construction, like a common law instrument or a statute. It is to be interpreted so as to carry out the great principles of government and not to defeat them. . . . In particular, constitutional provisions designed to secure the liberty and other rights of the individual should be construed liberally in favour of the citizen."¹ An eminent American publicist has recently pointed out that "the method of free decision" has today become dominant in the field of constitutional law. The provisions of the Constitution, he observes, have a content and a significance which vary from age to age, and it is the task of the method of free decision to arrive at a solution which is permanent, for the Constitution does not lay down rules of conduct for a brief period only but "for an expanding future".²

A similar but more liberal view has been taken on the continent of Europe as well as in Latin American States. Thus, for instance, Smend makes the following observation in regard to the Constitution of Germany: "It is the specific significance of the Constitution, which is applicable to a particular subject as well as to the totality of the State and its processes of integration, that it not only authorizes but also demands an interpretation which is elastic and amplifying (extensive or evolutive: *ergänzende*) which differs substantially from juridical interpretations of other kinds." As regards the Italian Constitution, the general view is that "the provisions of the Constitution are not similar to mathematical formulae which find their essence in their form but are linked together as living organic institutions and must be considered in the light of the complex and ever new experience of national life; and their interpretation must not be rigid and from a narrow vision so as to impede the natural

¹ Black, *Constitutional Law*, pp. 77-78.

² Cardozo, *Nature of Judicial Process*, p. 111.

development of the life of the State."¹ In the light of these generally accepted principles, the conclusion appears to be irresistible that the courts in India have very often adopted too narrow and rigid an interpretation in dealing with the provisions of the Constitution.

¹ Picrandrei, *L'Interpretazione della Costituzione*, Studi di Diritto Costituzionale, p. 510.

PART II
GENERAL PRINCIPLES OF
ORGANIZATION

CHAPTER V

STRUCTURE OF THE INDIAN REPUBLIC

India: an Association of States. Lord Bryce describes the United States of America as "a Commonwealth of commonwealths, a Republic of republics, a State which, while one, is nevertheless composed of other States even more essential to its existence than it is to theirs." This apt description is equally applicable to the Republic of India. Under the first Article of the Constitution, as it originally stood, India consisted of three different categories of States, unequal in area, population and material resources. The first category comprised those States which were designated as Governor's Provinces under the Government of India Act, 1935, and also included the truncated Provinces of Assam, the Punjab and West Bengal, portions of which were detached and assigned to Pakistan under the Indian Independence Act of the British Parliament. To the second category belonged the leading Indian States which were formerly under a monarchical regime. These were of two types: individual entities such as Hyderabad and Mysore which retained their separate identity and constituted separate units of the Indian Federation, and corporate entities such as the Union of Rajasthan which were formed by the amalgamation of several Indian States which had separate existence before the commencement of the Constitution. These two categories of States were federally united to constitute the Union of India. Therefore, they possessed the status of federal units and exercised powers of sovereignty conferred on them by the Constitution, independently of the Government of the Union.

There was a third category of States which comprised the three Chief Commissioner's Provinces of the Government of India Act, 1935 and a few Princely States, either as individual or as corporate units. Although the Constitution included them under the category

of States; they were not, in fact, constituent units of the Federation in so far as they were under the direct control of the President of the Union, and enjoyed only such powers as were conferred on them by the Union Parliament; in other words, their position was analogous to that of a province in a decentralized State. The territories of India included the territories of these three categories of States as well as the territories of the Andaman and the Nicobar Islands which were also directly administered by the President of the Union.¹

This position has been substantially modified by the States Re-organization Act, 1956 and the Constitution (Seventh Amendment) Act, 1956. In the first place, the territory of India comprising the Part A and Part B States and some of the Part C States has been redivided, mainly on a linguistic basis, and the number of constituent States has thus been considerably reduced. The Republic of India now comprises fourteen constituent States and six Union Territories. (See Appendix II) Secondly, the distinction between Part A and Part B States has disappeared. In consequence, the special provisions relating to Part B States in Part VII of the Constitution has now been omitted. Other special provisions relating to these States have also been repealed. For instance, Article 371 of the Constitution, as it originally stood, provided that for a period of ten years the government of the Part B States shall be under the general control of the President and shall be liable to carry out his particular directions. This provision is no longer operative. For the same reason Article 278 is not to be found in the Constitution. This had provided that for a period of ten years from the commencement of the Constitution, the Union Government may make special financial arrangements with a Part B State. The office of Rajpramukh corresponding to that of the Governor of a Part A State has also ceased to exist. Thirdly, some of the Part C States like Ajmer, Bhopal, Coorg and Cutch have been merged in the constituent States, and the other States of this category have been converted into Union Territories. The system of administration which had previously obtained in these territories has also been modified by the amendment of Articles 239 and 240 of the Constitution.

Alteration of State Boundaries and Admission of New States. There is one important point which should be noticed in this connexion. Most federal constitutions expressly provide that no

¹ For a detailed discussion of the pre-Federation status of the Princely States, see the present writer's *The Indian States, Their Status, Rights and Obligations*, Chap. I.

constituent State shall be dismembered, or united with another or deprived of any part of its territory without the consent of its duly constituted organs. Thus, the Swiss Constitution expressly guarantees the territorial integrity of the Cantons. The Soviet Constitution also lays down that the territories of the constituent Republics shall not be altered without their consent. Under Article 4 of the Constitution of the United States of America no State can be "formed by the junction of two or more States or parts of States, without the consent of the Legislatures of the States concerned as well as of Congress." Article 13 of the Argentine Constitution similarly requires the consent of the Provinces concerned and approval of the Federal Legislature. The Commonwealth of Australia Act, 1900 provides a double safeguard in such cases: the consent of the Legislature of the State concerned and the approval of the majority of the electors of the State voting upon the question. Article 45 of the Mexican Constitution is more definitive. It guarantees the existing boundaries of the constituent States provided that no disputes arise with regard to them, in which case the Federal Congress is authorized to settle the disputes. Article 73, however, enables the Federal Congress to create a new State out of an existing State but lays down two specific conditions: approval by a two-thirds majority of the members present and voting of each House of the Congress and ratification by a majority of the Legislatures of the States. In all these cases it will be seen that the alteration of the boundaries of a constituent State requires at least the consent of its legislature; and the provision has been embodied in the constitution not only to guarantee the continued existence of the units but also to emphasize the federal character.

The Indian Constitution has, however, adopted a different rule. Under Article 3 of the Constitution, the Union Parliament may by law (a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State; or (b) increase or diminish the area of any State; or (c) alter the boundaries or the name of any State. The only condition which the Constitution lays down is that a Bill dealing with this matter cannot be introduced in the Union Parliament except on the recommendation of the President, and unless the views of the Legislature of the State concerned have been ascertained by the President. It has also been laid down that a law enacted under this provision shall not be deemed to be an amendment of the

Constitution. It is true that this provision has been borrowed from the Government of India Act, 1935; nevertheless it constitutes a departure from the generally accepted rule of federal constitutions. The only precedents in support of the provision are to be found in the now defunct Austrian Constitution of 1920 and the Weimar Constitution of Germany; but these two constitutions were marked by extreme centralism and contained many anti-federal features. There was also an apparent case of departure in the United States of America. This happened when the State of West Virginia was formed out of the territory belonging to Virginia but without the consent of its legislature. This was, however, justified by the Federal Government on the ground that the State of Virginia was in rebellion and its legislature, being unlawful, could not be consulted in regard to the formation of the new State, and therefore, the consent of the Government and Legislature of West Virginia, which had continued to remain loyal to the United States, was sufficient for the purpose of complying with the provisions of the Constitution.

Article 2 of the Indian Constitution expressly provides that the Union Parliament "may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit." Two points should be noted in this connexion. In the first place, this provision is applicable only in the case of acquisition of new territories. The power to create or establish new States out of the existing territories is dealt with in Article 3 of the Constitution. The same differentiation is to be found in Clauses I and III of Article 73 of the Mexican Constitution. Secondly, the provision confers two specific powers: the power to admit new States and the power to establish new States. The first may be exercised when an existing foreign State wishes to accede to the Indian Federation and the Union Parliament agrees to admit it as a new constituent State. Thus, for instance, if Portugal agrees to the cession of Goa to the Indian Union, then the State of Goa could be admitted to the Indian Union by virtue of this power vested in the Union Parliament. This does not, however, apply where the Indian Republic acquires a portion of a foreign State. In such a case the question of admitting a new State does not arise, but under this provision the Indian Parliament has the authority to establish a new State consisting of these newly acquired territories.

It should also be noticed that when the Union Parliament admits or establishes a new State, it is open to the Parliament to impose such terms and conditions as it thinks fit. This provision of

the Indian Constitution closely follows Section 121 of the Australian Commonwealth Act which similarly authorizes the Commonwealth Parliament to make or impose such terms and conditions as it thinks fit. On the other hand, there is no such provision in the Constitution of the United States or in those of Argentina and Mexico. It has been said that in the United States when a new State is admitted, "it is so admitted with all the powers of sovereignty and jurisdiction which pertain to the original States, and it enters on a footing of entire and perfect equality with the existing States. Such powers and rights cannot constitutionally be withheld or impaired by any conditions, compacts, or stipulations embraced in the enabling Act under which the new State is formed unless they would be valid and effectual if the subject of congressional legislation after the admission of the State." (Black, *op. cit.*, at p. 263). It is submitted that this principle cannot be invoked in interpreting Article 2 of the Indian Constitution since that Article specifically confers plenary power on the Union Parliament to impose conditions on the admission or establishment of new States. It has been argued that the provisions of the Constitution applicable to States will be equally applicable to the new State and it will be governed in the same way.¹ This argument does not, however, appear to be tenable in view of the clear and express terms of Article 2 of the Constitution.

Acquisition and Cession of Territory. There is no provision in the Indian Constitution dealing expressly with the question of acquisition and cession of territories. Sub-clause (c) of Clause (3) of Article 1 of the Constitution does, however, impliedly recognize the authority of the Republic to acquire new territories in so far as it provides that the territory of India shall, *inter alia*, comprise "such other territories as may be acquired." The power to acquire territories, whether by conquest or cession or otherwise, is an inherent attribute of the sovereignty of a State, and it is not necessary that there should be an express provision in the constitution for the purpose. The question of acquisition of territories after the commencement of the Indian Constitution has only arisen with regard to the transfer of French territories in India. This was effected by the conclusion of treaties between France and the Republic of India, as, for example, the Treaty of Cession of Chandernagore.

The cession of territory is also an attribute of sovereignty and there is no provision in the Indian Constitution regarding this matter.

¹ Basu, *Commentary on the Constitution of India*, Vol. I., at p. 35.

However, under Entry 14 of the Union List, the Parliament of the Republic has plenary power to legislate in respect of entering into treaties and the implementing of such treaties and agreements. It would, therefore, follow that if the Republic were to agree to the surrender of a part of its territory to another State, it could only be effected by the conclusion of an agreement approved by the Union Parliament. The question of obtaining the approval of the State concerned would not arise as, unlike other constitutions, the Indian Constitution does not require the consent of the Legislature of a State to the alteration of its boundaries. Further, there is no general rule of international law that the consent of the population directly interested is essential to the validity of a cession of territory.¹ Nor is any such rule to be found in any constitutional provision. It should also be borne in mind that under Article 253 the Union Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country. It would, therefore, follow that once a cession of territory has been approved by the Union Parliament, the law embodying this approval would be binding on all States, and the question of the consent of the Legislature or the electors of the State concerned would not arise. An interesting instance is furnished by the treaty concluded between the Republic of India and the State of Bhutan which, *inter alia*, provided for the transfer of a small area forming part of the constituent State of Assam. This was effected by an Act of the Union Parliament implementing the provision of the treaty.² The question of a plebiscite or of the consent of the State Government did not arise.

The Processes of Federalization. The structural organization outlined above has come into existence through three different constitutional processes. The first was the process of division. The unitary State of British India became a federal State under the Government of India Act, 1935, and the Provinces of British India thereby acquired the status of the units of a federation which they have retained under the Constitution. This process of a unitary State splitting up into several States to form a federal union has many historical precedents, as, for instance, in Soviet Russia, Argentina and Mexico. The second constitutional process was one of accession

¹ Hackworth, *Digest of International Law*, Vol. I., at p. 422.

² The Assam (Alteration of Boundaries) Act, 1951.

and unification and was carried out in two different stages. In the first stage all Princely States with the exception of Hyderabad and Kashmir executed instruments of accession surrendering specified powers of sovereignty to the Government of India and thus entered into a federal arrangement with the Dominion of India which came into existence on the 15th August, 1947. Then came the second stage of the constitutional process. Some of these States were closely associated by reason of their historical and cultural affinity and geographical proximity; these were grouped together under covenants executed by their Rulers to form Unions of States which ultimately became separate units of the Indian Federation. Others were attached to the States which were formerly known as Provinces, by virtue of the powers vested in the Government of India under their instruments of accession. Still others were allowed to retain their separate identity, primarily because of their geographical isolation, while surrendering their powers of sovereignty to the Government of India, and were classed as Part C States under the Constitution. The States of Hyderabad, Kashmir and Mysore, although belonging to the category of Princely States, stood on a different footing. All of them were separate units of the Federation. There was, however, a point of striking difference between Hyderabad and Mysore, on the one hand, and Kashmir, on the other. The relationship between Hyderabad and Mysore and the Dominion of India was founded upon the instruments of accession executed by them, but this contractual basis was merged in the Constitution. The relations between the Indian Union and the State of Jammu and Kashmir are, however, still governed by the instrument of accession, and the Constitution of India applies to the State of Jammu and Kashmir not *proprio vigore* but by virtue of the instrument of accession and subject to its terms and conditions. The third was the process of dismemberment and amalgamation. This was carried out under the provisions of the States Reorganisation Act, 1956. Thus, the State of Hyderabad has been dismembered and its territories distributed between the States of Andhra Pradesh, Bombay and Mysore to which the State of Goorg has also been attached. The States of Saurashtra and Kutch have been merged in the State of Bombay. Similarly the State of Madhya Pradesh has absorbed the States of Madhya Bharat and Bhopal. The Patiala and East Punjab States Union has been amalgamated with the State of Punjab. The State of Rajasthan has been enlarged by the addition of the territories of the State of Ajmer. All these processes,

it is evident, have led to the clarification and simplification of the structure of the Republic.

Organization of the Union Government. The foregoing discussion makes it quite clear that the Indian Republic is not only a State but also an association of States. Hence arises one of the striking features of its organization: the duality of the machinery of governance. There is, in the first place, the Union Government embracing the executive, legislative and judicial branches, broad-based on the doctrine of separation of powers. The executive authority of the Union is vested in the President, with a Council of Ministers to aid and advise him in the exercise of his authority. The Council of Ministers is headed by the Prime Minister who is appointed by the President, and the other Ministers are appointed by the President on the advice of the Prime Minister. The Ministers hold office during the pleasure of the President, but are also collectively responsible to the Lower House of the Union Parliament. It is also provided that no Minister can retain his office for a period of more than six consecutive months unless he is a member of either House of Parliament.

The legislative authority of the Union Government is vested in the Union Parliament which consists of the President and two Houses known as the Council of States and the House of the People. The Council of States, which is intended to represent the constituent units of the Indian Republic, consists of not more than 238 representatives of the States and of the Union territories and twelve other members nominated by the President in accordance with the provisions of the Constitution.¹ It should be pointed out that the representation of the constituent units in the Council of States is not on a basis of equality, as in other federal constitutions, but depends on the size and population of the units.

The method of election to the Council of States may also be differentiated from the systems adopted in other federal constitutions. Generally speaking, there are three distinct systems in regard to the composition of the Second Chamber of Federal Parliaments. The first is modelled on the scheme found in Confederations of States where the Second Chamber is of the nature of a diplomatic convention, each member State being represented by members of its Government or by delegates acting under specific mandatory instructions of the

¹ Article 80 of the Constitution, as amended by Section 3 of the Constitution (Seventh Amendment) Act, 1956. Only 220 seats have so far been allocated amongst the States and Union territories under Section 3 (2) of the Act.

Government. This was the system adopted in the German Constitution of 1867 in respect of the *Bundesrat*. The same procedure has been followed in the latest Constitution of Western Germany. Under the second system, the representatives of the member States are elected by one of their superior organs, more often by the legislatures, for a definite period without being subject to recall or to any mandatory instructions from the Government. Thus, under the Constitution of Austria, the representatives of the constituent units in the Federal Council are elected by the State Legislatures on the basis of proportional representation. According to the third system, the representatives of the States in the Upper House are directly elected by the people of each of the units for a specified term of years, as is the case in Australia. The same rule has been adopted in Article 47 of the Constitution of Argentina which reads as follows: "The Senate shall be composed of two Senators from each Province and two from the capital, elected directly by the people." The Indian Constitution has adopted the second system and thus given due recognition to the principle that in a federal constitution the Upper House is intended to represent the constituent States as such and not their people. Under Clause (4) of Article 80 of the Constitution, the representatives of the States in the Upper House of the Central Legislature are elected by the elected members of the Legislative Assemblies of the States in accordance with the system of proportional representation by means of the single transferable vote, while Clause (5) lays down that the representatives of the Union territories shall be chosen in such manner as the Union Parliament may by law prescribe. On the other hand, the Constitution has not accepted another rule of federal constitutions that there must be equality of representation in the Upper House of the Federal Legislature.

Every federation has a bicameral legislature: one House represents the member States as such, because a federation is an organic association of States, and the other represents the people of the federation and recognizes the fact that a federal State is also a constitutional unity. The Indian Constitution presents no exception to this general rule. It not only provides for a Council of States but also establishes a House of the People which consists of five hundred members chosen by direct election from territorial constituencies in the States and not more than twenty members to represent the Union territories, chosen in such manner as the Union Parliament may by law provide.¹ The

¹ Section 4, the Constitution (Seventh Amendment) Act, 1956.

Constitution also provides that there shall be allotted to each State a number of seats in the House of the People in such manner that the ratio between that number and the population of the State is, so far as practicable, the same for all States; and that each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it is, so far as practicable, the same throughout the State. Further, Section 43 of the States Reorganisation Act, 1956 requires the Central Government to constitute a Commission to be called the Delimitation Commission consisting of the Chief Election Commissioner and two other members each of whom shall be a person who is, or has been, a Judge of the Supreme Court or of a High Court. Section 44 of the Act prescribes the following duties of the Commission: (a) to determine on the basis of the population figures the number of seats, if any, to be reserved for the Scheduled Castes and Scheduled Tribes in the House of the People and in the Legislative Assembly of the States concerned; (b) to determine the parliamentary and assembly constituencies into which each new State shall be divided; (c) the extent of, and the number of seats to be allotted to each such constituency, and (d) the number of seats, if any, to be reserved for the Scheduled Castes and the Scheduled Tribes of the State in each such constituency.

The judicial power of the Indian Union is vested in a Supreme Court, which consists of a Chief Justice and not more than seven other judges unless the Parliament by law prescribes a larger number. Every judge of the Supreme Court is appointed by the President by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as he may deem necessary. A judge of the Supreme Court holds office until he attains the age of sixty-five years and cannot be removed from his office except by an order of the President passed after an address by each House of the Union Parliament. A person is not qualified for appointment as a judge of the Supreme Court unless he is a citizen of India and (a) has been for at least five years a judge of a High Court; or (b) has been for at least ten years an advocate of a High Court; or (c) is, in the opinion of the President, a distinguished jurist.

The Supreme Court has original jurisdiction in any dispute (a) between the Union and one or more States, or (b) between the Union and any State or States on one side and one or more States on the other, or (c) between two or more States in so far as these disputes

involve any question on which the existence or extent of a legal right depends. Under Article 32 the Court also enjoys original jurisdiction in respect of proceedings for the enforcement of the fundamental rights conferred by the Constitution. Besides, the Supreme Court is the highest appellate tribunal as well as the highest authority for the interpretation of the Constitution and the determination of the validity of any Union or State law.

The Apparatus of Government in the States. The foregoing description of the machinery of the Union Government does not, however, complete the picture of the Indian Republic. There is, in the second place, an equally elaborate apparatus of government in all the constituent States covering the three divisions of sovereign power—the executive, legislative and judicial. The executive authority in the States is vested in the Governor, who is appointed by the President of the Union, and holds office for a period of five years but during the pleasure of the President: a remarkable index of centralism which is not generally found in a federal constitution. There is a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is required by the Constitution to exercise any function in his discretion. The Chief Minister is appointed by the Governor and the other Ministers are appointed on the advice of the Chief Minister. All Ministers hold office during the pleasure of the Governor, and are also collectively responsible to the Legislative Assembly of the State. The position of the State of Jammu and Kashmir is, however, different, since its constitutional relationship with the Indian Union is governed by the instrument of accession. The internal government of the State is not, therefore, regulated by the Indian Constitution but by the constitution framed by its Constituent Assembly.

Detailed provisions have also been made in the Constitution regarding the organization of the legislative authority of the constituent States. Article 168 provides that for every State there shall be a Legislature which shall consist of the Governor and two Houses in the States of Bihar, Bombay, Mysore, Punjab, Uttar Pradesh and West Bengal and one House in all other States. Where there are two Houses of the Legislature of a State, one is known as the Legislative Council and the other as the Legislative Assembly, and where there is only one House it is designated as the Legislative Assembly. Under Article 170 of the Constitution, as amended by Section 9 of the Constitution (Seventh Amendment) Act, 1956, the Legislative Assembly

shall consist of not more than five hundred, and not less than sixty, members chosen by direct election from territorial constituencies in the State. The Article further provides that each State shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the State. Clause (1) of Article 171 lays down that the total number of members of the Legislative Council of a State shall not exceed one-third of the total number of members in the Legislative Assembly of that State. For the purposes of election to the Legislative Council of a State, the Constitution creates three special constituencies: local government constituency such as municipalities and district boards, graduates' constituency and teachers' constituency. In addition, a specified number of members is elected by the Legislative Assembly from amongst persons who are not members of the Assembly. Section 10 of the Representation of the Peoples Act, 1950 prescribes the allocation amongst these constituencies of the seats in the Legislative Councils of the States having such Councils.

An important and interesting change in the organization of the States has been introduced by the States Reorganisation Act, 1956. The Statute creates a kind of intermediate federation between the constituent units and the central organization of the Republic. Section 14 of the Act divides the entire territory of the Republic into five zones and establishes a Zonal Council for each zone. Each Zonal Council consists of a Union Member nominated by the President, the Chief Minister and two other Ministers of each of the States included in the zone, and not more than two members from each Union territory included in the zone. Each Zonal Council is an advisory body and may discuss any matter in which some or all of the States represented in that Council or the Union and one or more of the States have a common interest. In particular, a Zonal Council may discuss and make recommendations with regard to (a) any matter of common interest in the field of economic and social planning; and (b) any matter concerning border disputes, linguistic minorities or inter-State transport. It is the function of a Zonal Council to advise the Central Government and the Government of each State concerned as to the action to be taken on any matter of common interest.

There are also elaborate provisions regarding the judicial organization of the constituent units. Thus, the Constitution establishes a High Court for each State. Every High Court consists of a Chief

Justice and such other judges as the President may from time to time deem it necessary to appoint. Every judge of a High Court is appointed by the President after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a puisne judge, the Chief Justice of the High Court. A judge of a High Court holds office until he attains the age of sixty-five years and can only be removed from his office by the President after an address by each House of Parliament. A person is not qualified to be a judge of a High Court unless he is a citizen of India and has either held for at least ten years a judicial office in the territory of India or for at least ten years been an advocate of a High Court in a State.

Apart from its ordinary jurisdiction, both appellate and original, every High Court has power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warrant* and *certiorari*, or any of them for the enforcement of any fundamental right and for any other purpose. Further, every High Court has superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. This power does not, however, extend to any court or tribunal constituted under any law relating to the Armed Forces of the Republic.

Organization of the Union Territories. Article 239 of the Constitution, as amended by Section 17 of the Constitution (Seventh Amendment) Act, 1956, provides that every Union territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify. The President is also authorized to appoint the Governor of a State as the administrator of an adjoining Union territory, and where a Governor is so appointed, he exercises his functions as administrator of the territory independently of the Council of Ministers. These provisions are, however, subject to such laws as may from time to time be enacted by the Union Parliament.

Article 240 of the Constitution had authorized the Union Parliament to create or continue for any Union territory any local legislature or any council of advisers or ministers. This provision was deleted by the Constitution (Seventh Amendment) Act, 1956. It would, therefore, appear that the legislative authority in respect of any Union territory is now exclusively vested in the Union Parliament.

Section 3 of the Territorial Council Act, 1956 has, however, provided for the creation of a Territorial Council for each Union territory consisting of forty-one members in the case of Himachal Pradesh and thirty in the cases of Manipur and Tripura, chosen by direct election on the basis of adult suffrage and not more than two members nominated by the Central Government. The powers and functions assigned to a Territorial Council are, however, of an extremely limited character. Further, the Territorial Council of a Union territory is subject to the authority of the administrator who has statutory power to suspend the execution of any resolution or order of the Territorial Council if in his opinion the resolution or order is in excess of powers or is likely to lead to a breach of the peace, or to cause annoyance or injury to the public or to any class of persons. The Central Government has also power to supersede a Territorial Council if it is satisfied that it is not competent to perform its duties or abuses its powers.

As regards judicial organization of the Union territories, Article 241 of the Constitution authorizes the Union Parliament to constitute a High Court for a Union territory or to declare any Court in any such territory to be a High Court for all or any of the purposes of the Constitution. Further, under Article 231 of the Constitution, as amended by Section 16 of the Constitution (Seventh Amendment) Act, 1956, the Union Parliament has power to establish a common High Court for two or more States and a Union territory.

India: a Multi-Communal and Multi-Lingual State. Three outstanding features of the structural organization of the Indian Republic emerge from the foregoing discussion. In the first place, as we have already seen, the Indian Union is a constitutional unity and its powers extend throughout the territories of the Republic. It has, therefore, a juristic personality and exclusively enjoys international competence. One natural consequence of this feature is that there is one nationality throughout the Union. Unlike Switzerland and the Soviet Union, the Indian Republic is not a pluri-national State. The Swiss Confederation, as is well known, has at least four cultural nationalities, and the Soviet Union comprises several communities with political and cultural differences. In the Indian Republic, on the other hand, there has never been any question of political or cultural nationalities in spite of differences in religion, language and customs. On the contrary, a feeling of national unity has slowly grown up during a century or more of the British regime,

and political independence has strengthened this sentiment of basic unity. The Republic does, however, contain many religious and ethnic communities. The Constitution has attempted to remove, as far as possible, these communal differences by dispensing with the system of separate electorates which had previously obtained in British India, but it does make special provisions, although of a limited character, for such communities as the Scheduled Castes, the Scheduled Tribes and the Anglo-Indian community. For instance, the Fifth Schedule lays down specific and exceptional provisions for the administration and control of Scheduled Areas and Scheduled Tribes in any State other than Assam where the provisions of the Sixth Schedule operate for the administration of the Tribal Areas. Apart from these racial and cultural minorities, the population of India still contains over thirty million Mohammedans, although the dismemberment of India under the Indian Independence Act, 1947, was based on the ground that the Mohammedan population of India should be allowed to form the new State of Pakistan.

The Constitution also makes detailed provisions for linguistic differences. It expressly prescribes that Hindi shall be the official language of the Republic, but it also provides that for a period of fifteen years the English language shall continue to be used for the official purposes of the Republic. This provision is, however, subject to two important qualifications. In the first place, the President may during the period of fifteen years authorize the use of Hindi in addition to the English language. Secondly, even after the period of fifteen years, the Union Parliament may by law provide for the use of the English language. In addition, the Constitution recognizes as many as fourteen languages as regional languages, and authorizes the Legislature of a constituent State to adopt any one or more of the languages in use in the State for all or any of the official purposes of the State. The influence of linguistic differences in the Republic is clearly evident in the provisions of the States Reorganisation Act, 1956 and in the creation of such new States as that of Andhra.

Is India "an Indestructible Union"? It has already been pointed out that the second feature of the constitutional organization of the Indian Republic is that it is not only a State but also an organic association of States. To use Laband's words, these States possess powers of sovereignty in their own rights and conserve their status of States outside the sphere of subordination to the Federation.¹ The most

¹ Laband, *Das Staatsrecht des Deutschen Reiches*, Vol. I, p. 102 et seq.

important question which arises in this connexion is whether this organic association is an indissoluble union of its component parts or whether the States possess the right to secede from the federation. Generally speaking, all federal States are deemed to be permanent and indissoluble. Almost all leading jurists like Jellinek and Kelsen deny the existence of *jus secessionis*. The provisions of federal constitutions are generally to the same effect. Thus, for instance, the preamble to the Commonwealth of Australia Act, 1900, speaks of "an indissoluble federal Commonwealth". Article 1 of the Constitution of Brazil describes the United States of Brazil as "a perpetual and indissoluble Union". There is no express declaration of this kind in the Constitution of the United States, and it was, therefore, argued that the American States possess the right to secede from the Federation. It was contended that the American Union was merely a compact among States which had the right to resist any breach of the compact and to dissolve the Union in the event of such a breach. This was, for instance, the attitude of the State of South Carolina when it adopted an ordinance of secession in 1860. The ordinance was followed by a declaration of independence which alleged that the Union was dissolved and that South Carolina had resumed her position as a free, sovereign and independent State. The controversy was not, however, finally settled until after the Civil War when the doctrine of secession was definitely negatived by the Supreme Court in the leading case of *Texas v. White* (7 Wall. 700). In that case the question was raised as to whether the State of Texas could cease to be a State of the Union by enacting an ordinance of secession. The Court emphatically answered the question in the negative: "The Constitution in all its provisions looks to an indestructible Union composed of indestructible States. When, therefore, Texas became one of the United States she entered into an indissoluble relation.... Considered, therefore, as transactions under the Constitution the ordinance of secession adopted by the Convention and ratified by a majority of the citizens of Texas was absolutely null and without operation in law. ... The State did not cease to be a State nor her citizens to be citizens of the Union."

It should, however, be pointed out that in all these cases the indissoluble character of the federation may be modified in accordance with the procedure prescribed for amendment to the constitution, and this is impliedly accepted in the judgement of the Supreme Court. The Constitution of Venezuela goes further and attempts to

prescribe a limitation on the amending power by declaring that the Constitution shall always be of a federal and republican character. On the other hand, the Soviet Constitution of 1936 presents a totally different picture. It recognizes in explicit terms the right of the constituent republics to secede from the Soviet Union. It is true that certain Soviet jurists like Malitski affirm that the Article in question is purely a theoretical formula and does not confer any right susceptible of being effectively exercised. Other commentators like Troubiner, however, contend that the right of secession conferred on the Union Republics is "perfectly real" and has been exercised in the past and will continue to be exercised in the future. This view appears to be in conformity with facts, since in recent years the control of the Union over the Republics of the Ukraine and Byelorussia has been relaxed, and they have been allowed to exercise powers of external sovereignty.¹ It should, however, be remembered that in Soviet Russia there is considerable divergence between constitutional practice and the text of the Constitution. The Union of Burma also provides an exception to the general rule that a federal State is permanent and indissoluble. The Burmese Constitution confers on the Shan State and the Karenni State, two of its constituent units, the right to secede, but the right is not to be exercised during the first ten years.

The Indian Constitution does not contain any provision declaring that the Union is indissoluble and indestructible; nor is there any recognition, either implied or explicit, of the right of the constituent States to secede from the Union, the only exception being the State of Jammu and Kashmir whose relation with the Indian Union is governed by an instrument of accession. It would, therefore, appear that the Indian Republic is an "indestructible union", but it cannot be said that it is an indestructible union of indestructible States inasmuch as the territorial integrity of the constituent States can be abrogated under the powers conferred on the Union Parliament under Article 3 of the Constitution. It may, therefore, be argued that while the States of the Indian Republic have no right to secede, and, therefore, the constitutional unity of the Indian Republic cannot legally be dissolved; nevertheless by virtue of the power vested in it under the Constitution, the Union Parliament may alter the federal character of the State. It should also be added that, as in other

¹ Yanoff, *La constitution de l'union des républiques socialistes soviétiques*, p. 58 et seq.

federal constitutions, the unity of the Indian Republic may be affected by the exercise of the amending power conferred by the Constitution.

India: a Decentralized Unitary State. As we have already indicated, the third feature of the constitutional structure of the Indian Republic is that it is partly a decentralized unitary State. According to the generally accepted meaning of the term, a decentralized unitary State comprises certain territorial entities possessing their own sphere of competence and exercising powers conferred on them by the central authority but always subject to its control. Such is, for example, the structure of the Italian Republic under the Constitution of 1947 which provides for the creation of autonomous regions.¹ A decentralized unitary State may also mean that only a portion of the territory of the State has been converted into an autonomous region, the rest remaining directly under the central authority. Thus, the Czechoslovak Republic, under its Constitution of 1948, is partly unitary and partly decentralized. The Indian Republic, on the other hand, is partly federal and partly decentralized. Its federal character is evidenced by the existence of federal units designated as States. The Republic is also partly decentralized because it includes the Union territories which are not federal units and only possess such powers as are conferred on them by the Union Parliament.

It may be argued that in essence there is no difference between federal units and autonomous regions of a unitary State. Durand,² for instance, contends that a federal State is nothing but a decentralized unitary State in which the units possess exclusive competence without being subject to the control of the central authority and where the scheme of decentralization is established by the constitution and not by an ordinary law. According to Kelsen, the difference between a federal State and a decentralized unitary State is purely quantitative and not qualitative, for decentralization exists in both cases but in different forms.³ Kunz also maintains the theory of decentralization and contends that the distinction between a federal State, which he describes as "a false union of States", and a decentralized unitary State is purely relative and depends on the degree

¹ See the recent judgement of the Italian Constitutional Court in *President of the Council of Ministers v. the Region of Sicily*. (1958) Giur. cost., p. 972 where the Court has described the region as "the decentralized organ. of the administration of the State".

² *Les États fédéraux*, p. 350 et seq.

³ *Allgemeine Staatslehre*, p. 170 et seq.

of decentralization.¹ These theories, however, totally disregard the positive rules of federal constitutions. In the first place, the difference between federal States and decentralized unitary States is not purely quantitative, as Kelsen tries to make out. Construed in its strictly constitutional sense, the term decentralization has a two-fold significance. Firstly, it means that the totality of sovereign power of a State is vested in its central organs. Secondly, it also implies that it is the central organs which delegate a portion of their power to the territorial entities; in other words, whatever powers are enjoyed by these units depend on a grant from the central government and may be withdrawn or curtailed whenever the grantor considers it necessary to do so. In the case of a federal State, however, there is no delegation of power by the federal government to the constituent units; the power which is vested in the units does not owe its origin to a central grant. This means that the constitutional autonomy of the member States of a federation cannot be abridged by the federal government except to the extent authorized by the constitution. Secondly, decentralization implies a hierarchy of authorities; it means the delegation of power by a superior to an inferior authority. This, however, is not the case in a federal State where the central authorities and the constituent units are equal and co-ordinate within their respective spheres of competence. Thirdly, decentralization is not the same thing as division of power, for otherwise there would be no distinction between a unitary State and a decentralized unitary State, since even in a unitary State there is division of power between the three different organs of the State. It would be clear from the foregoing discussion that there is no basis for contending that a federation is a decentralized unitary State.

¹ *Die Staatenverbindungen*, p. 713.

CHAPTER VI

DISTRIBUTION OF LEGISLATIVE POWER UNDER THE INDIAN CONSTITUTION

Division of Power: the Essence of Federalism. It has already been pointed out that the Indian Republic has a federal structure and is, therefore, a State as well as a union of States. We have also seen that a direct consequence of this organization is the co-existence of two sets of government covering the same territory. It follows, therefore, as a logical corollary that the totality of sovereign powers of the Indian Republic is distributed between the Union Government and the Governments of the component States, as in all other federal constitutions. This is one of the salient features of a federal State, and has been taken by Jellinek as the basis for his definition of federation. He says: "A federal State is, therefore, a State in which the sovereign State authority distributes by means of a Constitution the totality of the functions exercisable within its sphere of control in such a manner that it reserves for its own exercise only a certain quantum of them, leaving, however, the residue to the non-sovereign member States created by this constitutional grant of autonomous State power, without any control in respect of the establishment of norms of regulation as well as in respect of the manner and method of the exercise itself, as long as the constitutional limitations are observed."¹ It is clear that this definition is only applicable to cases where a unitary State has transformed itself into a federal State, for in such cases the constituent units are undoubtedly the creation of the central government. It is not, however, true of federal States which have come into existence as the result of an agreement or convention concluded amongst sovereign States, as in the case of the Soviet Union. Jellinek's

¹ *Die Lehre von den Staatenverbindungen*, at p. 278.

definition must, therefore, be regarded as unsatisfactory; nevertheless, it does emphasize one of the essential features of a federal State, namely, the distribution of legislative competence between the central government and the governments of the units. As the Supreme Court of Argentina has aptly observed, the federal form of government presupposes the co-existence of a central authority and diverse local authorities which function within their respective spheres of action without being subject to any control.¹

Methods of Division of Legislative Power. It is now necessary to examine how the power of legislation is generally divided in a federal State and compare it with the system which has been embodied in the Indian Constitution. Generally speaking, the distribution of legislative powers between a federation and its component units may be effected in two different ways. In the first place, a federal constitution may expressly and specifically enumerate the powers of the federation and leave the remainder in the hands of the authorities of the constituent States. This is known as the method of enumerated powers. Thus, Article I of the Constitution of the United States of America confers on the Federal Legislature the power to make laws on certain defined and specified matters. In addition, it has the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States." Some of the enumerated powers are exclusively vested in the Federal Legislature, either expressly or by necessary implication. Others may be concurrently exercised by the States in the absence of federal legislation. (*Gibbons v. Ogden*, 9 Wheat. 1.) On the other hand, Article 10 of the Constitution provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." It follows, therefore, that residuary powers are vested in the States, and the Legislature of a State is competent to enact any law in respect of any subject unless it is expressly or by necessary implication prohibited under the provisions of the Constitution. No Act of a State Legislature can, therefore, be held *ultra vires* unless it is proved to be contrary to the terms of the Constitution. Apart from this clear distinction between the enumerated powers of the Congress and the residuary powers of the State Legislatures, the Constitution also prescribes

¹ Zavalia, *Jurisprudencia de la Constitución Argentina*, Vol. 1., at p. 4.

limitations on the legislative authority of the Federal Government and of the Governments of the States.

This method of enumerated powers has been incorporated in other federal constitutions. For instance, "the scheme of the Australian Constitution, like that of the Constitution of the United States, is to confer certain definite and specified powers upon the Commonwealth, and to leave the residue of power in the hands of the States. This is expressed in our Constitution by the language of Sections 51 and 52, which confer the Federal power, and Section 107, which provides that 'every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth.' " (Per Griffith, C. J., in *Deakin v. Webb*, 1 C.L.R., at p. 605). Secondly, Section 51 of the Commonwealth Act, 1900 expressly provides that the Commonwealth Parliament shall have power to make laws relating to "matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth." It will be noticed that this grant of power is analogous to the doctrine of ancillary powers under the Constitution of the United States. It has been observed that this "grant of power carries with it the grant of all proper means not expressly prohibited to effectuate the power itself." (Per Isaacs, J., in *Australian Boot Trade Employees' Federation v. Whybrow*, 11 C.L.R., at p. 338.) Thirdly, the doctrine of concurrent powers, as enunciated under the Constitution of the United States, also prevails under the Australian Constitution. Thus, the States share with the Commonwealth the power to make laws in respect of all matters except those which are exclusively vested by the Constitution in the Commonwealth Parliament and those which have been specifically withdrawn from the States by the Constitution. (Wynes, *op. cit.*, p. 90).

The same four-fold rule is to be found in the Swiss Constitution. In the first place, Articles 8, 19, 20, 22 to 31, 32 (a) (b) and (c), 34, 36 to 42, and 64 to 70 enumerate specified and definite powers of the Federal Legislature. Secondly, although there is no express provision regarding ancillary powers, the rule has been evolved by judicial interpretation and its application is as wide as under the Constitution of the United States. Adopting what has been called the method of

consequences (*Verfahren des Konsequenz*), it has been held that whatever is necessary for the execution of a purpose expressed in a constitutional rule falls within the competence of the Federal Legislature.¹ Thus, Article 54 of the Constitution, which places the right to marry under the protection of the Federation, has been deemed to authorize the Federal Legislature to make laws with respect to the conditions and forms of marriage. It has also been held that the power to make laws in respect of a specified matter, although not expressly granted by the Constitution, falls within the purview of the Federal Legislature if it is of the essence of the Federation.² Thirdly, the Constitution has expressly vested residuary powers in the Cantons. Article 3 of the Constitution provides that "the Cantons are sovereign so far as their sovereignty is not limited by the Federal Constitution, and as such they exercise all rights which are not delegated to the Federal authority." Fourthly, there is a sphere of concurrent powers arising directly under the Constitution. Some of these fall within the competence of the Federal Legislature if it decides to enact any laws in regard to them. There are others in respect of which the legislative power is distributed between the Federation and the Cantons. Finally, there is another class of subjects in respect of which the Federal Legislature only exercises the powers of superintendence or inspection.

The position under the Argentine Constitution is slightly different. Article 67 of the Constitution enumerates the powers of the Federal Legislature. Further, Clause 28 of the same Article confers ancillary powers on the Federal Legislature. On the other hand, Article 104 contains a general provision preserving residuary powers for the Provinces. In addition, Article 105 enumerates some of the specific powers of the constituent units. This grant of power has been construed by the Supreme Court of Argentina to mean that the Provinces "conserve their absolute sovereignty in everything relating to those powers which have not been delegated to the Nation, as Article 104 itself recognizes. From this fundamental principle it may be deduced that it pertains exclusively to the Provinces to enact laws and ordinances of local taxation, police, hygiene and, in general, of all those matters which they consider to be conducive to their well-being and prosperity." (Fallos 7, p. 373). This specific enumeration of certain powers of the legislatures of the constituent units is no doubt a departure from the scheme of distribution embodied in the Constitution of the

¹ Giacometti, *Die Auslegung der schweizerischen Bundesverfassung*, pp. 7 et seq.

² Garcia-Pelayo, *op. cit.*, p. 506.

United States. There is also another important point of difference. The Constitution expressly lays down in Article 108 that the Provinces cannot exercise the power delegated to the Federation. The Article further prescribes certain specific restrictions on the power of the Provinces. This has been interpreted by the Supreme Court to mean that the general restriction imposed by the Article is in no way abridged by the specific prohibitions. (Fallos 124, p. 379). It would, therefore, appear that under the Constitution of Argentina there is no field of concurrent powers, but the Court has held that "it is unquestionable that the Provinces retain an authority concurrent with the Congress" outside the sphere of exclusive competence as expressly laid down in the Constitution and apart from express prohibition on them. (Fallos 3, p. 131).

The Constitutions of Soviet Russia, Brazil and Mexico have merely adopted the method of enumerated powers and do not provide any detailed rules relating to the distribution of legislative power between the Federation and its constituent units. Thus, for instance, Article 14 of the Soviet Constitution enumerates matters which fall exclusively within the competence of the Supreme Soviet. Article 15, on the other hand, provides: "the sovereignty of the Union Republics is limited only by the provisions contained in Article 14 of the Constitution of the U.S.S.R. Outside these provisions each Union Republic may exercise its powers of governance in an independent manner."

The second method of distribution of legislative power is to be found in the Canadian Constitution. The main features of the scheme are as follows. In the first place, Section 92 of the British North America Act, 1867 specifically enumerates the legislative powers which may be exclusively exercised by the Provinces of Canada. Secondly, Section 91 of the Act expressly vests residuary powers in the Dominion Parliament and not in the Provinces as under the first scheme of distribution. Thirdly, Section 91 also enumerates a long list of matters which are within the exclusive authority of the Dominion Parliament. Fourthly, there is no specific provision in the Constitution Act regarding ancillary powers, but the rule has been evolved by judicial decisions. For instance, in *Montreal Street Railway Company v. City of Montreal*, (1912) A.C. 1 it was laid down by the Judicial Committee of the Privy Council that the Dominion Parliament has authority to enact laws in respect of a matter which is "necessarily incidental to the exercise of its legislative power expressly granted by the Constitution Act." This does not, however, authorize the Dominion Parliament to intrude

upon the provincial field by ancillary legislation in exercise of its residuary powers. Finally, there is no provision in regard to concurrent powers under the British North America Act, 1867 with one exception relating to agriculture, but the existence of this sphere has been established by judicial decisions. The enumerated powers of the Dominion and the Provinces are exclusive but they overlap, and where there is overlapping, the field of concurrent powers arises. [*Attorney-General of Ontario v. Attorney-General of Canada* (1894) A.C., 189].¹

The Scheme of Distribution under the Indian Constitution.

The Canadian pattern of distribution of legislative power has generally been followed in the Indian Constitution. In the first place, like Section 92 of the British North America Act, 1867, the Indian Constitution enumerates the subjects with respect to which the Legislatures of the States have exclusive power to make laws. This has been designated in the Constitution as the State List. Secondly, it follows the Canadian precedent and enumerates the matters with respect to which the Union Parliament has exclusive power to make laws. This is known as the Union List. Thirdly, Article 248 of the Constitution vests residuary powers in the Union Parliament, as in Canada. Fourthly, the Indian Constitution like the Canadian Constitution does not expressly provide for the grant of ancillary powers. It would, however, appear that the rule is applicable under the Indian Constitution, as it was applicable under its predecessor, the Government of India Act, 1935. This follows from the fact that both the Union Parliament and the Legislatures of the States have plenary powers in respect of matters which fall within their competence. Thus, in *United Provinces v. Atiq Begum*, A. I. R. (1941) F.C. 16, it was held by the Federal Court, in dealing with the Legislative Lists under the Government of India Act, 1935, that "none of the items in the Lists is to be read in a narrow and pedantic sense, and each general word should be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be comprehended in it." On the basis of the Canadian decisions it may rightly be contended that the rule would not be applicable where by virtue of ancillary legislation in exercise of its residuary powers under Article 248 of the Constitution the Union Parliament purports to invade the exclusive sphere of the State Legislature. Here, however, the similarity between the two Constitutions ends, for the Indian Consti-

¹ For a recent comparison of the Canadian method with the Australian system, see the judgment of Rand, J. in *Murphy v. Canadian Pacific Railway*, (1958) Canada L.R. 626.

tution proceeds to include a list of subjects designated as the Concurrent List in respect of which the Union Parliament as well as the State Legislatures have power to make laws.

There are, however, three specific exceptions to this general rule of distribution. In the first place, under Article 249, the Union Parliament has power to legislate with respect to a matter in the State List, if the Upper House of the Parliament has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that the Union Parliament should make laws with respect to that matter. Secondly, the Constitution authorizes the President of the Union to issue a Proclamation of Emergency if he is satisfied that a grave emergency exists whereby the security of India or of any part of the Indian territory is threatened, whether by war or external aggression or internal disturbance; and, while such a proclamation is in operation, the Union Parliament has power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List. Thirdly, the Union Parliament is also competent to make any law in respect of any matter, whether in the Union or State or Concurrent List, for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or any decision made at any international conference, association or other body. It will be noticed that in all these cases the Union Parliament has been authorized to invade the sphere of legislative competence exclusively assigned to the constituent States. These three exceptions, therefore, clearly illustrate the well-marked centralism of the Indian Constitution.

It has been contended that, generally speaking, in all federal constitutions the relations between the central government and the governments of the units fall under three different categories: (i) "relations of ordination", i.e. where the two governments co-operate in the formation of the will of the federal State, as in the case of the Upper House of the Federal Parliament which is generally presumed to represent the component States; (ii) "relations of supra- and sub-ordination", i.e. cases where the power of the federal government is supreme and unquestionable, as, for instance, in the matter of defence of the federal State; and (iii) "relations of co-ordination", where the two sets of governments have clearly demarcated spheres of activity within which each of them is supreme, as in the case of the distribution of legislative power between the central government,

on the one hand, and the governments of the units, on the other.

The three exceptions which have been discussed above clearly indicate that, contrary to the provisions of other federal constitutions, the legislative power of the Indian Republic is paramount even in the field of "co-ordinate relations". The supremacy which has been expressly assigned to the Union Parliament in respect of international conventions and agreements is perfectly reasonable, as from the point of view of international law it is the Union alone which has international personality and, therefore, exclusively possesses international rights and obligations. This is true of all federal constitutions. For instance, in the Commonwealth of Australia where the Constitution Act does not expressly confer on the Commonwealth Parliament any authority to invade the legislative competence of the States, it has been held that the Commonwealth Parliament is competent to legislate in respect of a matter which is reserved to the States for the purpose of implementing international conventions. The Canadian Constitution contains the provision that "the Parliament and the Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries." According to judicial decisions, the Dominion of Canada has in addition the necessary powers for implementing treaties concluded by Canada but not as part of the British Empire. Thus, dealing with the question of broadcasting, the Privy Council has declared as follows: "It is Canada as a whole which is amenable to the other Powers for the proper carrying out of the convention; and to prevent individuals in Canada infringing the stipulations of the convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada."¹ The same view has been taken in the United States, where it has been held by the Supreme Court that the Congress is competent to make laws for the execution of a treaty, although the subject matter may be outside the legislative authority of the Congress.² The same principle has been adopted in other federal constitutions. For instance, Article 133 of the Mexican Constitution provides that treaties concluded by the President of the Republic with the approval of the Congress shall be the supreme law throughout the territory

¹ *In re Regulation and Control of Radio Communication*, (1932) A.C. 304.

² *Missouri v. Holland*, 252 U.S. 416.

of the Union, and requires the judges of each State to conform to them notwithstanding any contrary provisions in the Constitutions or laws of the States. The wording of Article 31 of the Argentine Constitution is exactly similar.

There is, however, no precedent for the express grant of power to invade the legislative sphere of the States in the event of an emergency. Thus, for instance, the Constitution of Argentina, which expressly authorizes the Central Government to declare an emergency (*estado de sitio*) and suspend constitutional guarantees in respect of fundamental rights, does not confer any power on the Federal Parliament to encroach upon the exclusive legislative sphere of the constituent States in the event of such a declaration.

Three Zones of Legislative Power. The foregoing discussion makes it clear that in almost all federal constitutions there are three distinct zones of legislative power. In the first zone, i.e. exclusively federal, the federal parliament is the supreme authority. In the second, i.e. exclusively State, the legislatures of the States ordinarily enjoy and exercise the powers of legislation without the control and supervision of the federal parliament. This is true of all authentic federal constitutions. Several jurists have, therefore, contended that there are two independent and co-existent sovereignties in every federal State. There is also a third zone of legislation in which the juristic frontiers of the authority of the two sets of governments are not demarcated. This is generally known as the field of concurrent powers, and may be divided into three different classes. In the first place, a federal constitution may provide that in certain specified matters the legislation of the constituent units shall be subject to the approval of the central government. For instance, under Article 55 of the Swiss Constitution, the Cantons may by legislation take measures necessary for the prevention of abuses of the liberty of the press, but such laws must be submitted to the Federal Council for approval. The right of veto which has, under certain constitutions, been conferred on the federal government is of similar character. Article 12 of the Weimar Constitution of Germany provided that the Reich had the right of veto in respect of specified laws of a State in so far as the welfare of the Reich as a whole was thereby affected. In the second group of cases, the federal authorities are competent to enact principles or to give general directions, leaving it to the units to formulate complementary rules and to decide upon the method and manner of their application. Thus, under

the Soviet Constitution, the Union Government is only authorized to establish basic principles in the matter of education. Similarly under Article 75 of the Constitution of Western Germany, the Federal Government has the right to establish basic precepts in respect of such matters as the "legal status of the Press", and detailed legislation is formulated by *Laender*. Similarly, Article 6 of the Constitution of Brazil authorizes the legislatures of the States to enact supplementary legislation in regard to specified matters. It would, therefore, be clear that in these cases the right of initiative rests with the federal organs, and the legislatures of the units are only competent to supplement federal legislation. In the third case, the federal legislature has authority, but not exclusive authority, to legislate in regard to certain specified matters. As long as this power is not exercised by the federation, the constituent States have plenary jurisdiction in respect of them. Thus, under the Indian Constitution, the Union Parliament as well as the Legislatures of the States have power to make laws with respect to any of the matters enumerated in the Concurrent List.

The Supremacy of Federal Laws. It is a basic principle of all federal constitutions that "the legal prescriptions established by the States lose their validity if they are in contradiction with the legal prescriptions established by the Federation." This principle has been incorporated in Clause (2) of Article 6 of the Constitution of the United States which, *inter alia*, provides that the laws of the United States made in pursuance of the Constitution shall be "the supreme law of the land". Clause V of the covering clauses of the Commonwealth of Australia Act, 1900 similarly provides that all laws made by the Commonwealth Parliament shall be binding on the courts, judges and people of every State and every part of the Commonwealth notwithstanding anything in the laws of any State. Section 109 of the Act further provides that "when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid." The same principle is to be found in the Constitution of Western Germany which expressly declares that "*Reichsrecht bricht Landesrecht*". There is no specific provision in the Swiss Constitution regarding this matter, although Article 6 declares the primacy of the Federal Constitution over that of the States; nevertheless, the rule of the supremacy of federal laws has been sanctioned by constitutional usages and the decisions of the Federal Tribunal since 1848. As Burckhardt points out,

"Cantonal law is in the same relation with respect to federal laws as is the Cantonal organization with respect to the federal, that is to say in a relation of subordination." It has, therefore, been held by the Federal Tribunal that if there is a conflict between a federal law and a Cantonal law, the federal law abrogates the Cantonal law.¹ The same rule is to be found in the Constitutions of Argentina and Mexico. For instance, Article 31 of the Argentine Constitution of 1853 adopted the wording of Article 6 of the Constitution of the United States and declared that the laws of the Nation which Congress may enact are "the supreme law of the Nation" notwithstanding any provision to the contrary contained in the provincial laws or constitutions. Article 133 of the Mexican Constitution lays down the same principle.

The Indian Constitution sets forth a detailed statement of the rule. Clause (1) of Article 254 provides that "if any provision of a law made by the legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of Clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void." It is clear that the Clause lays down two different rules. In the first place, it provides that a federal law prevails over a State law in the event of a conflict between them. Secondly, it also provides that an existing law shall prevail against a State law if there is any repugnancy between them, but this rule is applicable only when the existing law is with respect to one of the matters enumerated in the Concurrent List.

Both these rules are, however, subject to the exception embodied in Clause (2) of Article 254 which reads as follows: "Where a law made by the Legislature of a State specified in the First Schedule with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State." As a natural corollary of this exception, the proviso to Clause (2) lays down that nothing in Clause (2)

¹ García-Pelayo, *op. cit.*, pp. 500-501.

shall prevent Parliament from enacting at any time any law with respect to the same matter in the Concurrent List including a law adding to, amending, varying or repealing the law made by the Legislature of the State. It is necessary to point out that the exception embodied in Clause (2) of Article 254 is applicable only when the following conditions are satisfied: (a) both laws must relate to the same matter in the Concurrent List; (b) the federal law must be earlier in date or it must be an existing law; and (c) the State law must have been reserved for the consideration of the President and must have received his assent. The exception embodied in Clause (2) of Article 254 has no doubt an anti-federal character and is not to be found in any other federal constitution. It is, however, a *verbatim* reproduction of the rule contained in the Government of India Act, 1935. There was sufficient justification for incorporating the rule in the Government of India Act because the Governor of a State was required to reserve certain Bills for the assent of the Governor-General under the Instrument of Instructions issued under the Act. Amongst such Bills were included Bills the provisions of which would repeal or be repugnant to the provisions of any Act of the British Parliament applicable to British India. Questions of this character cannot now arise, and it is, therefore, difficult to justify the incorporation of the rule in the Indian Constitution. However, the effect of the exception has to a large extent been nullified by the grant of power to the Union Parliament under the proviso.

The Scope of the Rule of Supremacy. We have already pointed out that Clause (1) of Article 254 contains two different rules. The first is that if there is a repugnancy between a federal law and a State law, the federal law prevails. There is no limitation or restriction on the application of this rule apart from the exception embodied in Clause (2) of that Article. Secondly, Clause (1) of Article 254 also provides that if a State law is repugnant to an existing law with respect to one of the matters contained in the Concurrent List, the existing law shall prevail. From the wording of the Clause it would appear that the first rule is applicable in three different classes of cases. In the first place, the federal law may be a law enacted by the Union Parliament in respect of a matter in the Union List, and the State law may be a law in respect of a matter in the State or Concurrent List. Secondly, the federal law in question may be with respect to a matter in the Concurrent List whereas the State law may deal with a matter in the State or Concurrent List. Thirdly, the federal law

may have been enacted by the Union Parliament by virtue of its residuary powers under Article 248 of the Constitution whereas the State law relates to a matter in the State or Concurrent List.

However, it has been contended that the principle embodied in Article (1) of the Constitution is only applicable when there is a conflict between a federal law and a State law relating to the same matter in the Concurrent List. It has been argued that "the scope of Clause (1) is made clear by the words 'subject to the provisions of Clause (2)', for Clause (2) contemplates only a State law relating to the Concurrent List. Hence, Clause (1) speaks of repugnance between a Central law and a State law, relating to the same matter included in the Concurrent List."¹ This argument is, however, entirely untenable. In the first place, the wording of Clause (1) of Article 254 is clear and unambiguous, and according to the natural and ordinary meaning of the words it would certainly appear to cover every kind of federal law in conflict with every kind of State law. Secondly, Clause (2) merely lays down an exception to the general rule embodied in Clause (1) and, according to the generally accepted rules of interpretation, the meaning of a general provision cannot be controlled by an exception or a proviso.

In support of the contention that the rule of repugnancy only applies to conflicts in respect of the Concurrent List, reference has been made to the judgement of the Supreme Court in *Zaverbhai v. State of Bombay*, A.I.R. (1954) S.C. 752 and the decision of the Judicial Committee of the Privy Council in *Megh Raj v. Alla Rakhia*, A.I.R. (1947) P.C. 72. As regards the first case, it is clear that the Supreme Court was not dealing with the question of interpretation of Clause (1) of Article 254. The case fell within the purview of Clause (2) of that Article and the observations made by the Court were clearly confined to that Clause. In these circumstances that decision does not lend any support to the view that Clause (1) of the Article is only applicable to cases of repugnancy arising in connexion with the Concurrent List. In the Privy Council case the question was whether Sub-section (1) of Section 107 of the Government of India Act, 1935, which is exactly similar to Clause (1) of Article 254, was applicable to a case where the Provincial law, which was held to be entirely within the Provincial List, was repugnant to existing Indian laws such as the Indian Contract Act and the Civil Procedure Code. It was held by the Judicial Committee that Section 107 (1) of the Government

¹ Basu, *A Commentary on the Indian Constitution*, Vol. I., pp. 289-290.

of India Act, 1935 had no application in a case where the Province could show that it was acting wholly within its powers under the Provincial List and was not relying on any power conferred on it by the Concurrent List. It has already been indicated that Article 254 (1) contains two specific rules, and it is clear from the facts of the case that it fell within the purview of the second rule and not of the first rule. Therefore, the decision in this case is no authority for the proposition that a federal law can only prevail against a State law if both laws relate to a matter in the Concurrent List. The utmost that could be deduced from the judgement of the Privy Council is that an *existing law* cannot prevail against a State law unless both laws relate to a matter in the Concurrent List.

The view that the rule of repugnancy only applies in cases of conflict in respect of concurrent powers has also been expressed by the High Court of Andhra in the recent case of *Kumaraswami Kumandan v. Premier Electric Co.*, A.I.R. (1959) Andhra 3, where the question arose with regard to the interpretation of Clause (2) of Article 254. In delivering the judgement of the Court, Chandra Reddy, C. J. observed as follows: "In regard to matters included in the State List, even if there is any inconsistency between the Provincial and Central enactments, the former will supersede the latter. It is not every Central Act that prevails over the Provincial enactment." The learned Judge referred to the cases of *State of Bombay v. Narottamdas*, A.I.R. (1951) S.C. 69 and *Zaverbhai v. State of Bombay*, A.I.R. (1954) S.C. 752 in support of his proposition. The first case dealt with the interpretation of Lists I and II of the Seventh Schedule to the Government of India Act, 1935 and the question of the paramountcy of federal legislation did not arise. As regards the second case, it was contended by the learned Judge that it determined "the scope and range of Article 254". It has already been pointed out that this is not a correct interpretation of the decision, as in that case the Supreme Court was only dealing with the question of interpretation of Clause (2) and not of Clause (1) of Article 254.

In this connexion it is also necessary to refer to three earlier cases: *Stewart v. Brojendra Kishore*, A.I.R. (1939) Cal. 628; *Subramanyan v. Muttuswami*, A.I.R. (1941) F.C. 47 and *Bikram Kishore v. Tafazzal Hossain* A.I.R. (1942) Cal. 587, all of which raised the question of the application of Section 107 of the Government of India Act, 1935. It was contended in the first case that Section 10-C of the Bengal Court of Wards Act, 1879, as amended by the Assam Court of Wards

Act, 1937, was repugnant to certain "*existing Indian laws*" and, therefore, void to the extent of the repugnancy by virtue of Section 107 (1) of the Government of India Act, 1935. In dealing with this issue, B. N. Rau, J. observed as follows: "We have therefore here a matter which does not fall at all in the fourth entry of the Concurrent Legislative List but which falls entirely in the Provincial Legislative List, entries 2 and 21. Consequently, Section 107, Government of India Act, 1935, has no application so far as this particular repugnancy is concerned." In the second case the question was whether Section 168A of the Bengal Tenancy Act, 1885 was in conflict with Sections 51 and 60 of the Civil Procedure Code. It was, therefore, a case of alleged repugnancy between a Provincial law and an *existing Indian law*. While negating the application of the rule of paramountcy, Pal, J. observed that "in order to fall within the mischief of Section 107 (1), Government of India Act, 1935, both the Provincial law and the existing Indian law must be with respect to the same matter and that matter must be 'one of the matters enumerated in the Concurrent Legislative List'." It is obvious that neither of these cases has any bearing on the question of repugnancy between a federal law and a State law. In the third case the question did not actually arise but Sulaiman, J. dealt with the matter and expressed the view that the words "competent to enact" in Section 107 of the Government of India Act, 1935, which are also to be found in Clause (1) of Article 254 of the Constitution, undoubtedly covered matters both in Lists I and III. In other words, the rule of the supremacy of federal laws is applicable in all cases of repugnancy. As we shall see, this view is in accord with the common consensus of judicial opinion.

There has not been any actual decision of the Supreme Court of India on the point in issue. The judgement of the Court in *Tika Ramji v. State of U.P.*, A.I.R. (1956) S.C. 676, clearly shows that the question of the exact scope and extent of Article 254(1) is still open and has not yet been finally decided. It is, therefore, necessary to examine the point in detail. In the first place, the wording of Clause (1) of Article 254 is wide enough to cover every case of conflict between a federal law and a State law, as we have indicated above. There does not, therefore, seem to be any reason why the ordinary rule of interpretation should not be applied and the words construed in their natural and grammatical sense. Besides, the principle embodied in that Clause forms an essential ingredient of the concept of federation and should, therefore, be construed in its widest amplitude.

Secondly, the narrow interpretation which has been placed upon Clause (1) of Article 254 is not in accord with the almost universally accepted rule of federal constitutions. For instance, the Judicial Committee of the Privy Council has itself held, in dealing with the question under the Canadian Constitution, that "it has been frequently recognized by this Board, and it may now be regarded as settled law that, according to the scheme of the British North America Act, the enactments of the parliament of Canada, in so far as they are within its competency, must override provincial legislation." [*Attorney-General for Ontario v. the Attorney-General for the Dominion*, (1896), A. C. 348]. It will be noticed that the rule laid down by the Judicial Committee is not confined to cases of conflict in respect of concurrent powers but covers every case of inconsistency between a Dominion law and a Provincial law. In fact, the Dominion law impugned in that case had been enacted under the residuary power of the Dominion Parliament and the Provincial law dealt with a matter which was exclusively within the Provincial List. It has also been held that the rule of the paramountcy of federal legislation also applies where the Dominion law relates to a matter within the exclusive competence of the Dominion Parliament or has been enacted under its ancillary powers. [*Tennant v. Union Bank of Canada*, (1894) A.C. 31; *Attorney-General of Ontario v. Attorney-General of Canada*, (1894) A.C. 189]. It would, therefore, be evident that the position with regard to this matter under the Canadian Constitution is clear and that the rule of paramountcy is applicable in all cases of conflict between Dominion and Provincial legislation, whatever be the character of the legislative power exercised by the Dominion or Provincial Legislature. Like the Canadian Constitution Act, the Swiss Constitution does not contain any express provision regarding this matter, but there too the rule of paramountcy has been held to be applicable in all cases of repugnancy.¹ Thus, basing their decision on Article 3 of the Constitution and Article 2 of the Temporary Provisions, the Federal Council has laid down the rule as follows: "The text of the two Articles is very clear: no provision of any Cantonal Constitution or law can be enforced if it is in opposition to the Federal Constitution or any Federal laws enacted in accordance therewith." (*L'Affaire Gendre*, De Salis, Vol. I., p. 206). The Federal Tribunal has also repeatedly held that federal legislation prevails against Cantonal legislation in all cases of conflict.

¹ Burckhardt, *Ständemässiges Recht bricht Kantonales Recht*, Festgabe für Fritz Fleiner, Tübingen, 1927, at p. 74.

The same view has been taken by the High Court of Australia. We have already seen that whereas the Canadian Constitution contains no specific provision regarding the paramountcy of federal legislation, Article 109 of the Commonwealth Act, 1900 deals expressly with the matter. The generally accepted view of this section is that it "gives supremacy, not to any particular class of Commonwealth Acts but to every Commonwealth Act, over not merely State Acts passed under concurrent powers, but all State Acts though passed under an exclusive power, if any provisions of the two conflict." (*Engineer's Case*, 28 C.L.R., at p. 155). Isaacs, J. has laid down the rule as follows: "In case of inconsistency the State law, whatever it may be, under whatsoever power it is enacted, on whatsoever subject, must to the extent of the inconsistency be invalid. This constitutional provision is essential to the very life of the Commonwealth; a decision in favour of the respondents on this point destroys the supremacy of Federal law, which alone has held the American Union intact, has preserved the character of the Canadian Dominion, and can uphold the Australian Constitution." (*Federated Saw Mill, etc. Employees v. James Moore & Son Ltd.*, 8 C.L.R., at p. 530).

The Constitution of the United States contains an express provision regarding the supremacy of federal legislation, and this has been construed as meaning that "any Act of Congress which is valid and constitutional is supreme as against any law of a State which conflicts with it. When a State statute and a federal statute operate upon the same subject-matter, and prescribe different rules concerned, and the federal statute is one within the competency of Congress to enact, the State statute must give way."¹ The Constitution of Argentina contains a similar provision and the rule of supremacy has similarly been given its widest connotation by the Supreme Court of Argentina. Thus, in *Banco de la Nación Argentina v. Poder Ejecutivo de la Provincia de Mendoza*, Fallos 226, p. 408, where the conflict arose between a federal law exempting the National Bank of Argentina from the payment of taxes, whether federal or provincial, and a taxing statute of the Province of Mendoza, it was held by the Supreme Court that the Provinces have no power to retard, impede or control the functioning of any laws sanctioned by the Federal Legislature, and such provincial laws, being inconsistent with the federal laws, have no legal effect or validity. It will be noticed that in this case the provincial

¹ Black, *op. cit.*, at p. 29, citing *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 89.

law had been enacted in exercise of the residuary powers of the Provinces and the federal law was in respect of a matter which fell within the exclusive competence of the Federal Legislature. There was, therefore, no question of a conflict between concurrent powers. The Supreme Court, however, held that the rule of the supremacy of the federal law was applicable. (See also *Angel Livi v. Nydia Paradiso de Martinez*, Fallos 227, p. 387). Article 133 of the Mexican Constitution is an exact reproduction of the provision of the Argentine Constitution and has been construed as prescribing that a federal law prevails against a provincial law in all cases of repugnancy. The Supreme Court of Mexico has differentiated between supreme laws and secondary laws, and has laid down that as provincial laws fall under the second category, they must yield to federal laws which are the supreme law of the land under Article 133 of the Constitution. (*In re Fabrica de Papel "Coyoacan"*, Sem. jud., Vol. LXXII, p. 2086).

The rule that federal laws prevail against laws of the constituent units has always been recognized as an essential principle of Austro-German public law, and has been expressly embodied in Article 31 of the Constitution of the West German Republic. The rule has always been construed to mean exactly what it says; in other words, every federal law, lawfully enacted, abrogates any State law which is inconsistent with it, whatever be the source of the legislative power of the State or of the Federation. In fact, Laband has gone further and asserted that "paramountcy attaches not only to the laws of the Reich properly so-called, that is to say, promulgated with the assent of the Reichstag, but also to ordinances of the Reich provided that they are legally valid." (op. cit., Vol. II., p. 420). Kelsen has carried this interpretation to the extreme and contended that a federal law, although *ultra vires*, prevails against a State law. (*Allgemeine Staatslehre*, p. 221). Even if we disregard these extreme theories, the position under the Austro-German public law is clear that a federal law always abrogates a State law in cases of conflict.

The Meaning of Repugnancy. Three preliminary points should be noted. In the first place, the rule embodied in Article 254 comes into play only if there is repugnancy between a federal law and a State law which are both valid and *intra vires*. If one of them is beyond the competence of the Legislature concerned, the question does not arise. The contrary view expressed by Kelsen cannot, therefore, be accepted. Secondly, the expressions "federal law" and "State law"

do not necessarily mean and refer to an entire statute. Any provision of a federal law will be a federal law. Similarly, a provision of a State law will also be a State law. [Per Pal, J. in *Bikram Kishore v. Tafazzal Hossain*, A.I.R. (1942) Cal. at p. 591]. This position has been made clear beyond doubt by the wording of Article 254. Thirdly, the word "law" embraces both substantive and procedural law, as pointed out by Sen, J. in *Bikram Kishore's case*.

Article 254 of the Constitution deals with the effect of "repugnancy" between two legislative measures, one enacted by the Union Parliament and the other by the Legislature of a State. Section 109 of the Australian Constitution speaks of "inconsistency" between a federal law and a State law. Article VI of the Constitution of the United States provides, *inter alia*, that a federal law is the supreme law of the land notwithstanding anything to the "contrary" in any State law. Similarly, Article 31 of the Argentine Constitution speaks of "*disposicion en contrario*", while the Supreme Court of Argentina has used such phrases as "*en pugna con*" and "*una directa y absoluta incompatibilidad*". Etymologically, the word "repugnant" is derived from the Latin word "*repugnare*", to fight, and means "contrary or contradictory, inconsistent or incompatible, making or offering resistance, opposing, resisting, hostile, antagonistic or refractory." (*Shorter Oxford Dictionary*, p. 1710). It is, therefore, clear that the various expressions used in various constitutions and by various courts bear exactly the same meaning.

The precise connotation of the term "inconsistency" has been examined at length in several decisions of the High Court of Australia, and three different tests have been suggested for the determination of the question. The first is "the test of obedience". In *Whybrow's case*, 10 C.L.R. 266, it was held that there is no inconsistency between two laws when it is possible to obey each law without disobeying either. The "obedience" test was, however, rejected in *Clyde Engineering Co., Ltd. v. Cowburn*, 37 C.L.R. 466, where Knox, C. J. and Gavan Duffy, J. observed "that the test is not sufficient or even appropriate in every case. Two enactments may be inconsistent although obedience to each of them may be possible without disobeying either." The same view was expressed by B. N. Rau, J. in *Stewart v. Brojendra Kishore*, A.I.R. (1939) Cal. 628: "We think that this is too narrow a test: there may well be cases of repugnancy where both laws say 'don't' but in different ways. For example, one law may say 'No person shall sell liquor by retail, that is, in quantities of less than five gallons at a

time' and another law may say 'No person shall sell liquor by retail, that is, in quantities of less than ten gallons at a time'. Here, it is obviously possible to obey both laws, by obeying the more stringent of the two, namely the second one; yet it is equally obvious that the two laws are repugnant, for to the extent to which a citizen is compelled to obey one of them, the other, though not actually disobeyed, is nullified."

The second is the test of "the occupied field". It was thus explained by Isaacs, J. in *Clyde Engineering Co. v. Cowburn*, 37 C.L.R. 466: "If, however, a competent legislature expressly or impliedly evinces its intention to cover the whole field that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field." In *Ex parte McLean; Re Firth*, 43 C.L.R. 472, Dixon, J. has thus stated the principle: "The inconsistency does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its intention is directed. When a Federal Statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter." The same test was adopted by B. N. Rau, J. in *Stewart's case* referred to above. After examining the principle deducible from English, Canadian and Australian cases, he said: "If the dominant law has expressly or impliedly evinced its intention to cover the whole field, then a subordinate law in the same field is repugnant and, therefore, inoperative. Whether and to what extent in a given case, the dominant law evinces such an intention must necessarily depend on the language of the particular law." It follows as a logical corollary that where a federal law does not purport to be exhaustive, but permits other laws restricting or qualifying the general provision made in it, it cannot be said that any restriction or qualification introduced by another law is repugnant to the federal law. [*Mrgh Raj v. Alla Rakhia*, A.I.R. (1942) F.C. 27]. The test of "the occupied field" was also accepted by the Supreme Court of India in the recent case of *Tika Ramji v. State of U.P.*, A.I.R. (1956) S.C., at pp. 698-699.

It is, however, submitted that the test of "the occupied field" cannot be adopted in all cases as the sole and single test for determining the question of repugnancy. As Dixon, J. has pointed out in *Wragge v. Sims Cooper & Co.*, 50 C.L.R., at p. 490, the question of repugnancy

may not be properly or adequately solved in every case by the application of the test of "covering the field". We have suggested that the rule of repugnancy may be applicable in a case where there is a conflict between a federal law relating to an entry in the Federal List and a State law dealing with a matter enumerated in the State List. In such a case the test of "covering the field" can offer no solution, because when a federal law deals with an item in the Federal List, it presumably intends to occupy the whole field relating to the matter and the Legislature of a State is not constitutionally competent to enter the field. Similarly, the Legislature of a State purports to deal with the whole field in relation to an entry in the State List. Therefore, when there is a conflict between two such laws, the question of covering the whole field does not arise, because the ensuing conflict is incidental to the exercise of their plenary power by both the Legislatures. A typical instance is furnished by the Argentine case of *Angel Livi v. Nydia Paradiso de Martinez*, Fallos 227, p. 387. In that case the conflict arose between Section 769 of the Code of Procedure of the Province of Cordoba and Article 6 of the Federal Statute dealing with urban leases. The law of procedure fell entirely within the ambit of provincial powers as it had not been delegated to the Federal Congress, and the law relating to urban leases was within the constitutional competence of the Federal Congress. Here, therefore, there was no question of one legislature entering the field entirely occupied by the other legislature. It was purely a matter of overlapping of two validly enacted laws. The test of "the occupied field", therefore, could in such a case offer no solution. The question was whether in fact there was a "collision" between the two laws, and a definite conclusion could only be reached by construing the provisions of the two statutes. It is further submitted that the test of "the occupied field" can be properly and adequately applied only in cases of conflict in respect of the Concurrent List, for in such a case if the dominant legislature has evinced its intention to cover the whole field, the law enacted by the other legislature must give way.

It has also been suggested that another test for solving the question of repugnancy is to ascertain as to whether the two laws relate to the same subject-matter. (*Wenn v. Attorney-General of Victoria*, 77 C.L.R. 84). It is, however, respectfully submitted that this test does not lend any assistance in determining the question. It is obvious that there cannot be any repugnancy unless the two conflicting provisions are *in pari materia*. In fact, the conflict can arise in respect of the Con-

current List mainly when the two legislatures purport to deal with the same entry in the Concurrent List. A more satisfactory test is to be found in the judgement of Channell, J. in *Gentel v. Rapps*, (1902) 1 K.B. 160. Under English law the question of repugnancy arises in respect of bye-laws enacted under powers conferred by special statutes of Parliament. In this case the issue was whether a bye-law was repugnant to the general law. In dealing with this matter, Channell, J. made the following pertinent observation: "A bye-law is not repugnant to the general law merely because it created a new offence and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it makes unlawful that which the general law says is lawful. It is repugnant if it expressly or by necessary implication professes to alter the general law of the land." The same test was adopted by the High Court of Sicily in a case where the question was of a conflict between a State law and a Regional law. (Foro it. 1954. I., 729). This corresponds to the test referred to by Varadachariar, J. in *Megh Raj v. Alla Rakhia*, A.I.R. (1942) F.C. 27, "namely, whether there is such an inconsistency between the two provisions that one must be taken to repeal the other by necessary implication." This has also been endorsed by the High Court of Australia: "When a State law, if valid, would alter, impair, or detract from the operation of the law of the Commonwealth Parliament, then to that extent it is invalid." (*Victoria v. Commonwealth*, 58 C.L.R., at p. 630).

The following conclusions emerge from the foregoing discussion. First, the question of repugnancy is a question of fact and must be determined by construing the two conflicting provisions according to the ordinary rules of interpretation. Second, if as a result of interpretation, it is clear that the State law purports to alter or amend the federal law or that there is a direct conflict between the two laws, no further question arises. Third, when the position is not, however, clear, then the test of "the occupied field" may be resorted to for the purpose of settling the question. This test is particularly applicable when there is a conflict between a federal law in respect of an item in the Concurrent List and a State law in relation to the same matter. In this connexion it is necessary to emphasize that the paramount question is whether there is a conflict or not, and it is not necessary to take recourse to legal or linguistic dialectics if the position is clear. As Starke, J. rightly observed in *Clyde Engineering Co.'s case*: "The question is whether there is inconsistency, contrariety,

repugnancy—the words are interchangeable—between the State law and the scope and purpose of the law of the Commonwealth.”

The Effect of Repugnancy. The question now arises as to what is the precise effect of the rule of repugnancy on the law which is affected by it. As we have already seen, under the Austro-German public law, a federal law abrogates a State law and the natural consequence is that the State law becomes null and void and has no legal effect whatsoever to the extent of the repugnancy. The same view has been taken by the Federal Tribunal of Switzerland. There too it has been held that a federal law abrogates a Cantonal law in so far as there is repugnancy between them.¹ Under Article 31 of the Constitution of Argentina, the Federal Constitution as well as all federal laws are “the supreme law of the Nation”; in other words, they stand on the same footing *vis-à-vis* the laws of a Province. Therefore, the Supreme Court of Argentina has not differentiated between the effect of a repugnancy between a federal law and a provincial law and that of a repugnancy between the Constitution and a provincial law. In both cases the provincial law is unconstitutional and, therefore, null and void. (Fallos 3, p. 131). Similarly, under Article 133 of the Mexican Constitution, a federal law abrogates a provincial law in the event of repugnancy.

This view of the effect of repugnancy has not, however, been accepted under other constitutional systems. The rule adopted by the Judicial Committee of the Privy Council in regard to the Canadian Constitution is that when a Dominion law prevails against a provincial law, the legal consequence is that the operation of the provincial law is suspended so long as the Dominion law continues to be in force. Thus, in *Attorney-General for Ontario v. Attorney-General for the Dominion*, (1896) A.C. 348, it was laid down by the Privy Council that when a provincial law comes into collision with a Dominion law “provincial must yield to Dominion legislation, and must remain in abeyance unless and until” the Dominion legislation is repealed by the Dominion Parliament. It would appear that the same rule obtains under the Australian Constitution. Wynes, for instance, argues that although it may be contended that since Section 109 uses the word “invalid”, “the State Act must remain so for all time, but the State Act remains a ‘law’, and it is only invalid when and so long as it is inconsistent with the Federal law; when the inconsistency is removed, the law

¹ Affolter, *Droit public suisse*, at p. 50.

which was previously invalid 'to the extent of the inconsistency' becomes again, it is submitted, of full force and effect." The basis of this argument appears to be that when a State law becomes invalid under Section 109 of the Constitution Act on the ground of its inconsistency with a federal law, the State law is not thereby repealed or revoked and may become operative as soon as the federal law is repealed. This is because a State law is only invalid when and so long as it is inconsistent with a Federal law. This view has been endorsed by the High Court in *Carter v. Egg and Pulp Board*, 66 C.L.R. 557. The law of the United States is, however, different. An Act of the Congress which is valid and constitutional is supreme as against any law of a State which is in conflict with it. The State statute must, therefore, yield to the federal enactment and "is in effect no law, but an abortive attempt to exercise a power not possessed by the State legislature." However, in cases of concurrent powers when the Congress exercises its legislative authority, it thereby supersedes and suspends all existing State laws on the same subject in so far as they are inconsistent with the Acts of the Congress. "The federal law does not make them invalid, if they were not so before. Neither does it repeal them." (Black, *op. cit.*, pp. 29 & 190).

It is clear that in the United States a distinction is made between conflicts which arise in regard to concurrent powers and conflicts which relate to exclusive powers. It may be urged on this analogy that a similar result would follow from the provisions of the Indian Constitution. We have already pointed out that the rule of repugnancy under Article 254 may be applicable in three different classes of cases. It may, therefore, be argued that in the case where a federal law in respect of an entry in the Concurrent List is in conflict with a State law in respect of the same matter, the State law is only suspended so long as the federal law is in force and again comes into operation as soon as the federal law is repealed or so amended as not to be in conflict with the State law. In the other two cases, however, the rule of abrogation, as in the United States of America, will apply; in other words, the State law will cease to have any effect or validity irrespective of the question whether the federal law remains in force or not. It is submitted that this interpretation is not correct. The wording of Article VI of the Constitution of the United States is essentially different from the text of Article 254 of the Indian Constitution. The provision embodied in the American Constitution speaks of the supremacy of federal laws as against contrary provisions in the laws

of the States. It does not anywhere expressly state the effect of a conflict between a federal law and a State law. On the other hand, Article 254 (1) of the Indian Constitution specifically provides that a federal law prevails against a State law which is repugnant to it and the State law is void to the extent of the repugnancy. It is, therefore, clear that the principle deduced from the provision of the Constitution of the United States is not supported by the language of Article 254 (1) of the Indian Constitution. In these circumstances it is not justifiable to import the interpretation which has been placed upon Article VI of the Constitution of the United States. Similarly, it has to be pointed out, the rule evolved by judicial interpretation under the Canadian Constitution is equally inconsistent with the actual wording of Article 254 (1) of the Indian Constitution. It follows, therefore, that neither the American rule nor the Canadian principle can be accepted as valid under the Indian Constitution.

It has also been suggested that the effect of repugnancy under the Indian Constitution is not the same in all cases. Where a State law was enacted subsequent to a federal law, the State law is void *ab initio* because the repugnancy arose as soon as the State law came into force. Where, however, a federal law came into operation after a State law, a different rule obtains. In such a case the State law is valid *ab initio* and becomes invalid from the moment of the enactment of the federal law, but revives if and when the federal law is repealed. It is submitted that this interpretation is equally untenable. In the first place, the word "void" used in Clause (1) of Article 254 must necessarily have the same meaning whether the State law is enacted before or after the federal law. But the interpretation suggested above uses the word in two different senses in the two different cases. The word "void" means null and void in the first case, but in the second case it only means that the operation of the law is suspended. This is totally incompatible with the generally accepted rules of interpretation. According to the *Shorter Oxford Dictionary*, the word "void" means "having no legal force; legally null, invalid, or ineffectual." If this is the ordinary meaning of the word, then it must be applicable in both cases and a State law must be null and void whether it was enacted before or after a federal law. Reference has in this connexion been made to the judgement of the Supreme Court in *Behram Khurshid v. State of Bombay*, A.I.R. (1955) S.C. 123. It is true that in that case a distinction was made between pre-Constitution and post-Constitution laws in determining the effect of Article 13(1), and

it was held that so far as existing laws were concerned they were not void altogether because Article 13 (1) had not been given any retrospective effect. The majority of the Supreme Court, however, made it clear that after the coming into force of the Constitution the effect of Article 13 (1) on all repugnant laws was that "it nullified them, and made them ineffectual and nugatory, and devoid of any legal force or binding effect." (Per Mahajan, C. J.). The Court did not interpret the word "void" in two different senses in the two different cases. In one case the repugnant law was void only in respect of *facta pendentia* and *facta futura*. In the second case the repugnant law was void *ab initio*. There is, therefore, nothing in the judgement of the Court to justify the interpretation of the word "void" in two different senses. It is, therefore, submitted that Clause (1) of Article 254 means exactly what it says that a repugnant law is void to the extent of the repugnancy in all cases, and, therefore, there can be no question of revival if the paramount law is repealed or so amended as not to be in conflict with the secondary law. The High Court of Australia has held that under Section 109 of the Australian Constitution Act, a State law, which is inconsistent with a federal law, is not totally abrogated but remains in abeyance till the inconsistency is removed. (*Carter v. Egg & Pulp Board*, 66 C.L.R. 557). But, as we have already seen, this interpretation is founded upon the words "to the extent of the inconsistency" which have been interpreted as meaning that a State law is invalid so long as there is inconsistency and revives as soon as the inconsistency is removed. It should, however, be pointed out that the expression "to the extent of the inconsistency" has spatial and no temporal connotation and can only mean that so much of the State law is void as is inconsistent with the paramount law. The operative word in the expression is "extent" which means "compass" and the expression cannot by any stretch of reasoning be construed to mean that so long as the inconsistency exists. It would, therefore, be abundantly clear that the only reasonable interpretation of Clause (1) of Article 254 is that a State law which is repugnant to a federal law is void to the extent of the repugnancy, and the word "void" means, to quote Mahajan, C. J., "ineffectual and nugatory and devoid of any legal force or binding effect." As regards Clause (2) of Article 254, a different interpretation must be accepted. This was made abundantly clear by the Supreme Court in *Zaverbhai v. State of Bombay*, A.I.R. (1954) S.C. 752: "On a question under Article 254 (1) whether an Act of Parliament prevails against a law of the State,

no question of repeal arises; but the principle on which the rule of implied repeal rests, namely, that if the subject-matter of the later legislation is identical with that of the earlier, so that they cannot both stand together, then the earlier is repealed by the later enactment, will be equally applicable to a question under Article 254 (2)."

It should be added that the doctrine of severability comes into play in all cases of repugnancy. The doctrine was thus stated by Sulaiman, J. in *Shyamakant v. Rambhajan*, A.I.R. (1939) F.C. 74: "It is a well-established principle that if the invalid part of an Act is really separate in its operation from the other parts, and the rest are not inseparably connected with it, then only such part is invalid, unless, of course, the whole object of the Act would be frustrated by the partial exclusion. . . . The test is said to be whether a statute with the invalid portions omitted would be substantially a different law as to the subject-matter dealt with by what remained from what it would be with the omitted portions forming part of it." Applying this principle to a case of repugnancy under Section 107 of the Government of India Act, 1935, the learned Judge observed as follows: "The words 'to the extent of the repugnancy' occurring in Section 107 indicate that it is not essential that the whole Act nor even a whole Section must be declared invalid, but that it is necessary to ascertain exactly how much of it is void on account of repugnancy."

The Content of Legislative Power: the Union List. It now remains to examine the content of the authority of the Union and State Legislatures. This is the problem of distribution of specific powers between the Federation and its component units. A detailed scheme has been incorporated in the Seventh Schedule to the Indian Constitution which contains three different legislative lists: the Union List, the State List and the Concurrent List. It should be noted that there are three distinctive features of this scheme of distribution. Firstly, the Seventh Schedule contains a much more detailed enumeration of subjects than is to be found in any other federal constitution. Secondly, each item of the Lists has been given a detailed specification so as to obviate doubts and difficulties. Thirdly, Item 97 of the Union List expressly includes within the federal sphere "any other matter not enumerated in List II or List III including any tax not mentioned in either of those lists." This item read with Article 248 places the residuary powers of the Union beyond any question. These three features undoubtedly contribute to the precise and accurate determination of the content of the legislative power of the Union and

State Governments, and may, therefore, make it unnecessary to refer to judicial authorities many issues which have arisen under other federal constitutions.

External Affairs. There are several factors which determine the content of the authority of the Union and State Legislatures. We have already seen that the Indian Republic is an organic unity from the point of view of international law; hence all matters relating to international affairs naturally fall within the exclusive authority of the Union Parliament. The institution of several organs invested with the power to enter into relations with foreign States is essentially repugnant to the structure of a federal State. Therefore, the Union List contains a formidable number of subjects falling within the field of external affairs. These are: foreign affairs, including all matters which bring the Union into relations with any foreign country; diplomatic, consular and trade representation; United Nations Organization; participation in international conferences, associations and other bodies, and implementing all decisions made thereat; entering into treaties and agreements with foreign countries, and implementing all treaties and agreements and conventions with foreign countries; war and peace; foreign jurisdiction; citizenship, naturalization and aliens; extradition; admission into, and emigration and expulsion from India, including passports and visas; pilgrimages to places outside India; piracies and crimes committed on the high seas or in the air; offences against the law of nations committed on land, on the high seas or in the air; trade and commerce with foreign countries, including import and export across customs frontiers; and fishing and fisheries beyond territorial waters.

Such a detailed enumeration of subjects falling within the sphere of foreign affairs is not to be found in any other federal constitution. For instance, the Constitution of the United States does not expressly refer to foreign affairs but assigns to the President the power to appoint ambassadors and ministers to foreign countries, to receive diplomatic agents of foreign governments, and to negotiate treaties subject to the concurrence of the Senate. Section 51 of the Australian Constitution uses the term "external affairs" but does not give any further details regarding its content. Under the British North America Act, 1867, the list of powers expressly allotted to the Dominion Government does not contain any reference to foreign relations, but Section 132 provides that the Dominion Government and Parliament shall have all powers necessary or proper for performing the obligations of

Canada towards foreign countries arising under treaties. The power assigned to the Union Government under the Constitution of Soviet Russia is described as follows: "Representation of the U.S.S.R. in its international relations, conclusion and ratification of treaties with other States." Article 8 of the Swiss Constitution lays down that the Confederation has the sole right to conclude alliances and treaties with foreign powers. This is supplemented by Article 102 which provides that the Federal Council "watches over the external interests of the Confederation, particularly the maintenance of its international relations, and is, in general, entrusted with foreign relations." A limited assignment of legislative powers in respect of foreign affairs is also to be found in the Constitutions of Argentina, Brazil and Mexico.

Defence. All questions relating to the defence of the Indian Republic are questions of national importance, apart from being intimately connected with the external relations of the State; hence all such matters fall within the exclusive competence of the Union Parliament. The first nine items of the Union List fall under this category: defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and, after its termination, to effective demobilization; naval, military and air forces, and all other armed forces of the Union; delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas; naval, military and air force works; arms, ammunition and explosives, atomic energy and mineral resources necessary for its production; industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war; central bureau of intelligence and investigation; preventive detention for reasons connected with defence, foreign affairs, or the security of India and persons subject to such detention.

It would be abundantly clear that this detailed specification covers every aspect of defence and does not provide any scope for doubt or difficulties. The analogous provisions in other constitutions are comparatively meagre and inadequate. Thus, under the Constitution of the United States, the Federal Congress has power "to provide for the common defence and general welfare of the United States," to "raise and support armies," "to provide a navy" and "to make rules for the government and the regulation of the land and naval forces." The Australian Constitution Act speaks of "the naval and military

defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth." In the Canadian Constitution, the term used is "militia, military and naval services and defence." The Russian Constitution describes the defence power of the Soviet Union as "the organization of the defence of the U.S.S.R. and direction of all the armed forces of the U.S.S.R.; the establishment of the guiding principles of the organization of the military formations of the Union Republics". In Switzerland the Confederation has the sole authority to enact laws on the organization of the army. There is a further provision that measures for external safety and also for the maintenance of the independence and neutrality of Switzerland fall within the competence of the Federal Assembly. Under the Austrian Constitution, the Federal Government has exclusive power, both legislative and executive, in respect of "military questions". This includes "all necessary measures resulting from war or the consequences of war." Article 67 of the Argentine Constitution authorizes the Federal Congress "to provide for the security of the frontiers"; "to fix the strength of the Land and Naval forces in times of peace and war; and to establish regulations and ordinances for the government of the said forces." The provisions in the Constitutions of Brazil and Mexico refer only to the organization and regulation of the armed forces.

It is clear that under the Indian Constitution the entire field of defence has been assigned to the exclusive competence of the Union Government; in fact, the armed forces of the former Princely States have either been disbanded or enrolled in the Union Army. This was exactly the position in the United States of Brazil where the State Constitution authorized the States to maintain "militarized police," but these were enrolled in the Federal Army under Federal legislation. On the other hand, in Australia, Mexico and the United States of America, the States have the right to maintain their own militia subject to central control, and can raise armed forces with the previous approval of the Federal Government. In Switzerland, although the Confederation is not entitled to maintain a standing army, every Canton has the right to do so provided the total strength does not exceed three hundred. In Argentina the Provinces have express power to raise armed forces "in the event of foreign invasion or of a danger so imminent that it admits no delay." In Soviet Russia each of the Union Republics has its own "military formations", although under general control of the Union Government.

Communications. The next category of federal subjects may be described under the generic term of "communications", and includes, *inter alia*, the following important items: railways; national highways; shipping and navigation on national waterways, as regards mechanically propelled vessels, and the rule of the road on such waterways; maritime shipping and navigation, including shipping and navigation on tidal waters; lighthouses, beacons and other provisions for the safety of shipping and aircraft; national ports, including their delimitation and the constitution and powers of port authorities; airways, aircraft and air navigation; carriage of passengers and goods by rail, sea or air, or by national waterways in mechanically propelled vessels; posts and telegraphs, telephones, wireless, broadcasting and other like forms of communication; and regulation and development of inter-State rivers and river valleys to the extent declared by Parliament to be expedient in the public interest. It is evident that all these forms of communication are of national interest and, therefore, fall within the exclusive competence of the Union. There are, however, certain points of importance which differentiate this provision from those of other federal constitutions. For instance, under the Indian Constitution all railways belong to the Union and, in fact, the railways belonging to some of the former Princely States have been taken over by the Union Government. The position is, however, different in some of the other federal States. For instance, in Australia, in June 1944, there were 24,000 miles of State Railways as against 2,000 miles of Federal Railways. Similarly, Article 13 of the Brazilian Constitution provides for Union Railways as well as State Railways. Under Article 100 of the Constitution of Argentina the Provinces have the power to construct and maintain railways. In Russia not only the Union Republics but also the regional authorities have the power to construct railways to satisfy local needs. On the other hand, the federal power in respect of broadcasting under the Indian Constitution is much wider than in Australia and Canada where it is restricted to regulation and control. The power of the Dominion Government in Canada in respect of air navigation is also confined to "regulation and control". It would also appear that in the United States of America this federal power is similarly restricted. The position in regard to ports and harbours is also different in other federal States. For instance, in the United States of America they have been left to the legislation of the individual States, subject to the regulating power of Congress in so far as they belong to or are used for the kind of commerce

which may be designated as foreign or inter-State commerce. There is no express provision in the Australian Constitution regarding this matter, but it has been held that federal control over transport, which arises under the trade and commerce power of the Commonwealth, embraces ports and harbours in so far as international and inter-State trade is concerned.

Federal Economic Interests. Another important category of Union subjects embraces economic questions affecting the interests of the Union as a whole. Some of these important items are: inter-State trade and commerce; incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations, and of corporations, whether trading or not, with objects not confined to one State; insurance and banking; bills of exchange, cheques, promissory notes and other like instruments; patents, inventions and designs; copyright, trade-marks and merchandise marks; establishment of standards of weights and measures; industries the control of which is declared by the Union Parliament to be expedient in the public interest; regulation and development of oil fields and mineral oil resources, petroleum and petroleum products; regulation of such mines and such mineral development as may be specified by the Union Parliament; and regulation of labour and safety in mines and oil fields.

It will be clear that the foregoing enumeration covers a large field of economic and commercial matters, but does not complete the picture of the competence of the Union Government in respect of such affairs. This enumeration must be read in conjunction with the powers which the Union Parliament may exercise under the Concurrent List. This List includes such important subjects as economic and social planning, commercial and industrial monopolies, industrial and labour disputes, welfare of labour, social security and social insurance. In comparison with these powers of the Indian Parliament the legislative authority of the Federal Legislatures under the Constitutions of the United States, Australia and Canada appears to be very limited, although the extent of the federal power in such cases has been enlarged by judicial interpretation. For instance, in the United States of America the most important subject which has been assigned by the Constitution to the Federal Government is trade and commerce, but the scope of this power has been so enlarged by judicial interpretation as to include every kind of economic activity. Some of the other federal constitutions, however, contain elaborate

provisions analogous to those of the Indian Constitution. Under the Swiss Constitution the legislative powers of the Confederation in respect of economic and commercial matters was extremely limited, and, in spite of the fact that the ambit of these powers was enlarged in practice by interpretation by the Federal Council, it was found necessary to implement them by a constitutional amendment. Thus, under the constitutional reform of 1947, which has amended several Articles of the Constitution and introduced new Articles, the legislative authority of the Confederation in the economic field has been substantially augmented. This reform has had a two-fold effect. Firstly, it has regularized a series of legislative measures which were in fact contrary to the terms of the Constitution. Secondly, it has enabled the Federal Government to prepare elaborate economic plans and thus take an active share in the formulation and regulation of the economic activities of the people.

Federal Institutions. The next group of federal subjects comprises all those matters which, by their very nature, must fall within the competence of the Union Parliament. These are: Union agencies and institutions; Union public services and Union Public Service Commission, and All-India services; powers, privileges and immunities of Parliament and its members; salaries and allowances of members of Parliament; emoluments, allowances and privileges of the President and Governors; salaries and allowances of the Ministers of the Union; constitution, organization, jurisdiction and powers of the Supreme Court and constitution and organization of the High Courts. The Union Parliament has also exclusive authority in respect of its own elections and elections to the offices of the President and Vice-President as well as in respect of the Election Commission. The Union List also includes several subjects which are of inter-State importance and could not, therefore, be left to the Legislatures of the States. These include extension of the jurisdiction of a High Court in a State to any area outside that State; extension of the powers and jurisdiction of members of a police force belonging to a State to any area outside that State; inter-State migration and inter-State quarantine; and co-ordination and determination of standards in institutions for higher education or research, and scientific and technical institutions.

Ancillary Matters. There is also a long list of financial powers of the Union Parliament, but these have been dealt with in a separate chapter. The Union List also provides for ancillary

powers in respect of the matters assigned to the exclusive legislative competence of the Union Parliament. These are: offences against laws with respect to any matters contained in the Union List; enquiries, surveys and statistics for the purpose of any of the matters included in the Union List; jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in the Union List, but not including fees taken in any court. There is, however, no provision, either in the Constitution itself or in the Union List in respect of the implied powers of the Federal Government, such as is to be found in the Australian and American Constitutions. The last item of the Union List does, however, emphasize the grant of residuary powers to the Union Parliament already provided for under Article 248.

The State List. Three preliminary observations should be made in this connexion. In the first place, as we have already seen, unlike the units of other federations except Canada, the constituent States of the Indian Union do not possess any residuary powers. [*Durgeshwar v. Secretary, Bar Council*, A.I.R. (1954) All. 728]. Secondly, the matters which have been assigned to the Legislatures of the States are of a purely regional character and include very few matters of general importance. Thirdly, the grant of power in relation to the State List is expressly controlled by the grant of power in regard to the Union and Concurrent Lists so that the scope of the items in the State List is necessarily restricted by the various matters enumerated in the Union and Concurrent Lists. This is clear from Clause (3) of Article 246 of the Constitution which lays down that the legislative power of the States is subject to the grant of exclusive powers made to the Union Parliament under Clause (1) as well as to the grant of concurrent powers made under Clause (2).

An examination of the State List shows that the Legislatures of the States can deal with the following important subjects only: public order, which presumably means public peace and tranquillity; administration of justice, including constitution and organization of all courts, except the Supreme Court and the High Court; police, prisons, reformatories, Borstal institutions and other institutions of a like nature; local self-government; public health and sanitation; education including universities other than central universities; State institutions like libraries and museums; communications other than those included in the Union List; agriculture and animal husbandry; water supplies, irrigation and canals, drainage and embankments,

water storage and water power; all questions relating to land and land tenure; forests and fisheries, including protection of wild animals and birds.

The List also includes several economic and industrial subjects. These are: regulation of mines and mineral development subject to the power granted to the Union; industries subject to the related item in the Union List; gas and gas-works; trade and commerce within the State subject to the power of the Union Parliament under the Concurrent List; production, supply and distribution of goods subject to the power granted under the Concurrent List; markets and fairs; weights and measures except establishment of standards; moneylending and moneylenders; incorporation, regulation and winding up of corporations other than those specified in the Union List, and universities and co-operative societies, including incorporated societies and associations; and betting and gambling.

There are also several matters which, by their very nature, must fall within the competence of the Legislatures of the States. These are: elections to the Legislatures of States subject to the provisions of any law made by the Union Parliament; salaries and allowances of members of the Legislatures and officers of the Legislatures; powers, privileges and immunities of the Legislatures; salaries and allowances of Ministers of State; State Public Service Commission; and pensions payable by the State or out of the consolidated funds of the State.

The Concurrent List. Under Article 246 of the Indian Constitution, the Union Parliament as well as the Legislatures of the States have power to make laws with regard to any of the matters enumerated in the Concurrent List. There are four general rules in respect of the exercise of this power. In the first place, the power of any State to legislate in respect to any matter included in the Concurrent List remains unaffected until and unless ousted by a Union Law on the same subject. Secondly, as we have already seen, a State law is superseded to the extent of its inconsistency with a Union law except where the Union law is prior in date and the State law has been enacted with the assent of the President. Thirdly, both the State law and the Union law may remain in force if there is no inconsistency between them. Thus, a Union law may impose an obligation on individuals over and above the obligation of a similar character imposed by a State law. Fourthly, where a State law has been entirely superseded by a Union law, the subject falls exclusively within the competence of the Union Parliament.

An examination of the Concurrent List indicates that the matters enumerated therein fall under three different categories. In the first place, there are matters relating to law and order. These include such items as criminal law and procedure, preventive detention, civil procedure, and contempt of court, but not including contempt of the Supreme Court. The second group relates to personal rights and status such as marriage and divorce, wills and succession, transfer of property, contracts including partnership and agency, actionable wrongs, bankruptcy and insolvency, and trust and trustees. The third category embraces social and economic legislation and includes, *inter alia*, the following items: economic and social planning; commercial and industrial monopolies; trade unions, and industrial and labour disputes; social security and social insurance; and welfare of labour. It is obvious that all these items have been included in the Concurrent List because uniformity of legislation may become desirable and necessary in the interest of the Republic. This is why most of these items have been assigned to the Federal Parliament in other federal constitutions. For instance, Article 67 of the Argentine Constitution empowers the Federal Congress to enact "the Civil, Commercial, Penal, Mining, Air, Health, and Social Codes." Similarly, under Article 10 of the Austrian Constitution, such important subjects as civil and criminal law, labour legislation, professions and industries, and public health fall within the federal sphere. The Constitution of the U.S.S.R. prescribes that the exclusive authority of the Union shall extend to civil and criminal codes, judicial system and procedure, State insurance, principles of labour and national economic plans. It is, therefore, evident that the tendency of all modern federations has been to enlarge the social and economic sphere of the federal legislature. It should also be pointed out that some of the items in the Concurrent List necessarily fall within the competence of the Union Parliament because of their extra-territorial effect. For instance, removal of prisoners from one State to another could not be dealt with by the Legislature of a particular State, as a State law would not have any effect outside its territories. The item relating to "the prevention of the extension from one State to another of infections or contagious diseases" is of a similar character.

Plenary Powers of the Legislatures. It is axiomatic of all federal constitutions that within the sphere of legislation assigned to the Federation or to the constituent units, the legislature concerned has full and complete authority, subject to such limitations or prohibitions

as may be expressly embodied in the Constitution or may follow by necessary implication. Thus, it was held by the Privy Council in dealing with the Canadian Constitution that within the limits prescribed by the Constitution Act, the Legislature of a Province of Canada was supreme, and had the same authority as the Imperial Parliament or the Parliament of the Dominion of Canada. [*Hodge v. the Queen*, (1884) 9 App. Cas., at p. 132]. Similarly, it has been held in Australia that "the Federal Parliament has, within its ambit, full power to frame its laws". (Per Higgins, J. in *Baxter v. Ab Way*, 8 C.L.R. 646). The Supreme Court of Argentina has also held that the Federal Legislature as well as the Provincial Legislatures have plenary power within the ambit prescribed by the Constitution. (Fallos 7, p. 373). The same principle is applicable under the Indian Constitution. [See *In re Article 134 and Delhi Laws Act*, A.I.R. (1951) S.C. 332]. An interesting illustration of the plenary power of a legislature is its right to enact retrospective legislation. Several constitutions contain express prohibition against retrospective laws. For instance, Article 14 of the Mexican Constitution prescribes that no laws shall have a retrospective effect to the prejudice of any person (*en perjuicio de persona alguna*). Similarly, the Constitution of the United States forbids the enactment of *ex post facto* laws, and this has been construed as relating only to crimes and misdemeanours covered by criminal law. A similar prohibition against penal laws of a retrospective character is to be found in Article 20 of the Indian Constitution. However, subject to this prohibition, the Union Parliament as well as the Legislatures of the States have full power and authority to enact laws with retrospective effect. This is a natural consequence of their plenary powers. The rule has been thus laid down by the Supreme Court in *Union of India v. Madan Gopal*, A.I.R. (1954) S.C. 158: "While it is true that the Constitution has no retrospective operation, except where a different intention clearly appears, it is not correct to say that in bringing into existence new Legislatures and conferring on them certain powers of legislation, the Constitution operated retrospectively. The legislative powers conferred upon Parliament under Article 245 and Article 246 read with List I of the Seventh Schedule could obviously be exercised only after the Constitution came into force and no retrospective operation of the Constitution is involved in the conferment of those powers. But it is a different thing to say that Parliament in exercising the powers thus acquired is precluded from making a retroactive law. The question must depend upon the

scope of the powers conferred, and that must be determined with reference to the 'terms of the instrument by which, affirmatively, the legislative powers were created and by which, negatively, they were restricted'." The Court, therefore, held that Articles 245 and 246 read with Entry No. 82 of List I of the Seventh Schedule empower the Union Parliament to make laws with respect to taxes on income for the whole of the territory of India, and impose no limitation or restriction in regard to retroactive legislation. The Court, therefore, came to the conclusion that the Union Parliament was competent to make a law imposing a tax on the income of any year prior to the commencement of the Constitution. The same rule would necessarily be applicable to the legislative power of a State Legislature.

Another immediate consequence of the plenary powers of a legislature is that it is competent to make laws incidental to the exercise of its express powers under the Constitution. Several constitutions contain a specific grant of this ancillary power. For instance, Clause (XXIX) of Article 73 of the Mexican Constitution empowers the Federal Legislature "to enact all laws which are necessary to ensure the effective execution of the powers indicated above and all those which have been conferred by the Constitution on the authorities of the Union." As we have already seen, similar grants are to be found in the Constitutions of Argentina, Australia and the United States of America. On the other hand, there are constitutions which do not contain any express grant of this character. In such cases the rule of ancillary powers has been evolved by judicial interpretation. Thus, for instance, the Privy Council, while dealing with the bankruptcy laws of Canada, has observed as follows: "A system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. . . . Their Lordships do not doubt that it would be open to the Dominion parliament to deal with such matters as part of a bankruptcy law, and the provincial legislation would doubtless be precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion parliament." It has already been indicated that a similar judge-made law exists under the Swiss Constitution. The same principle has been accepted by the Supreme Court of India. Thus, in *Edward Mills Co. v. State of Ajmer*, A.I.R. (1955) S. C. 25, the Court has explained the rule as follows: "When a legislature is given plenary power to legislate on a particular subject there must also be an implied power to make laws incidental

to the exercise of such powers. It is a fundamental principle of constitutional law that everything necessary to the exercise of a power is included in the grant of the power."

Limitations on Plenary Powers: Territorial Restriction.

There are, however, several important restrictions on the plenary powers of a legislature. The territorial limitation on the power of a State Legislature is one of such limitations. Article 246 of the Indian Constitution makes it quite clear that the Legislature of a State has power to make laws only in respect of that State or a part thereof. In other words, a State Legislature has no power to enact extra-territorial legislation. Thus, in *State of Bombay v. Chamarbaugwala*, A.I.R. (1957) S.C. 699, the Supreme Court has laid down as follows: "The doctrine of territorial nexus is well established and if there is a territorial nexus between the person sought to be charged and the State seeking to tax him, the taxing statute may be upheld. Sufficiency of the territorial connexion involves the consideration of two elements, namely, (a) the connexion must be real and not illusory and (b) the liability sought to be imposed must be pertinent to that question. . . The question whether in a given case there is sufficient territorial nexus is essentially one of fact." Therefore, in the *State v. Narayandas*, A.I.R. (1958) Bom. 68, where sections 4 & 5 of the Bombay Prevention of Bigamous Marriages Act, 1946 were challenged on the ground that these provisions purported to legislate with regard to marriages contracted beyond the limits of the State, it was held by the High Court of Bombay that as there was no territorial nexus between the State and a marriage contracted outside its limits the impugned provisions of the Act were *ultra vires* the State Legislature.

The Rule against Colourable Legislation. This is another important limitation on the power of a legislature. The rule was thus explained by Mukherjea, J. (afterwards C.J.) in *Gajapati Narayan Deo v. State of Orissa* A.I.R. (1953) S.C. 375: "If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression

'colourable legislation' has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears on proper examination to be a mere pretence of disguise. : In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The Legislature cannot violate the constitutional prohibitions by employing an indirect method." In other words, the rule lays down that a legislature cannot go outside its sphere of competence, whether directly or indirectly. Every law must, therefore, be scrutinized as to whether the legislature by device purports to make a law which, though in form appears to be within its sphere, yet in effect and substance reaches beyond it: *Nagewara Rao v. Andhra Pradesh State Road Transport Corporation*, A.I.R. (1959) S.C. 308. The same rule obtains under other common law systems. For instance, as Lefroy points out, the Parliament of Canada cannot, under colour of general legislation, deal with what are provincial matters only; and conversely, provincial legislatures cannot, under the mere pretence of legislating upon one of the matters enumerated in Section 92, really legislate upon a matter assigned to the jurisdiction of the Parliament of Canada. "What is here referred to is legislation ostensibly under one or other of the powers conferred by the British North America Act on the enacting body, but, in truth and fact, relating to some subject which is not within the jurisdiction of that body." (Op. cit. at p. 76). In *Madden v. Nelson & Fort Sheppard Railway Co.*, (1899) A.C. 626, the Judicial Committee of the Privy Council has endorsed the principle that if the Dominion Parliament or the provincial legislatures have no power to legislate directly upon a given subject matter, neither can they legislate upon that matter indirectly.

The Rule against Delegated Legislation. This is probably the most important limitation on the powers of a legislature. Article 36 of the Constitution of Brazil furnishes an interesting illustration. This Article recognizes the doctrine of separation of powers and proceeds to lay down that "the authorities under the Constitution are precluded from delegating their attributes." In other words, under the

Brazilian Constitution, both the Federal Congress and the Legislatures of the States are not competent to delegate their powers of legislation to any person or body of persons, whether subordinate or otherwise. The reason for this express prohibition is to be found in the fact that under the previous constitutions there was a considerable abuse of delegation, and all important legislative measures were carried out by the executive in exercise of delegated powers. The prohibition is, however, subject to Article 87 which confers on the President of the Republic "the exclusive prerogative" to issue decrees and regulations for the faithful execution of laws. On the other hand, there is no provision in the Constitution of the United States containing any prohibition against delegation of legislative powers, but the rule has been deduced from the doctrine of separation of powers which is a basic feature of the political organization of the United States. As Harlan J. has rightly observed in *Field v. Clark*, 143 U.S. 649, that the Congress cannot delegate legislative power to the President is a principle universally recognized as vital for the integrity and the maintenance of the system of government established by the Constitution. However, as Willoughby points out, there are three main exceptions to this general rule. The first exception relates to the delegation of legislative power to local authorities for the purposes of local government. It has been held that such delegations are permissible because of the Anglo-Saxon practice prior to the Constitution. The second exception relates to conditional legislation. This arises when a law provides that the prescriptions contained therein shall only be applicable in the event of a specified contingency and authorizes the executive to decide whether or not such a contingency exists and thus to determine whether or not the law should be brought into force. In this case the executive authority does not enact a law but merely determines the existence of facts on which depends the enforcement of the law. Thirdly, a law which lays down a rule of conduct may also authorize the executive to issue regulations for the effective execution of the provisions of the law. But for the constitutional validity of such a delegation it is essential that the law must lay down the policy as well as the standard. (*Schechter v. United States*, 295 U.S. 495).

A different view has been taken both in Canada and Australia. The *locus classicus* is *Hodge v. Queen* (1884) 9 App. Cas. 117, where the question was whether the Provincial Legislature of Ontario could validly enact a law creating an executive body and empowering it to

pass resolutions regarding tavern licences and to impose penalties for the breach of such resolutions. The law was challenged on the ground *delegatus non potest delegare*. This contention was rejected by Their Lordships of the Privy Council who held that within the limits prescribed by the Canadian Constitution the Legislatures of the Provinces of Canada had plenary powers of legislation. They said: "Within these limits of subjects and area the local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion of Canada would have had under like circumstances to confide to a municipal institution or body of its own creation, authority to make bye-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation." The same principle has been followed by the High Court of Australia. In *Dignan's case*, 46 C.L.R. 73, Evatt, J. pointed out that the theory of separation of powers on which the rule against delegation was based, did not apply under the Australian Constitution. He was, therefore, of the view that the "true nature and quality of the legislative power of the Commonwealth Parliament involves, as part of its content, power to confer law-making powers upon authorities other than the Parliament itself", but the extent of the power granted was often a material factor in determining the validity of the legislation.

This may be compared with the position under Article 76 of the Constitution of Italy which expressly grants the power of delegation. This is no doubt a recognition of the theory which prevails on the continent of Europe that the power of delegation is inherent in legislative power. Article 76, however, subjects the power to certain conditions and lays down as follows: "The exercise of legislative function cannot be delegated to the Government except after the settlement of the directive principles and criteria and only for a limited period and for definite objects." The question of the precise significance of this provision was raised before the Italian Constitutional Court in the case of *Ente Colonizzazione Delta Padano*, (1957) Giur. cost., p. 684. The Court held that legislative function does not consist exclusively in the enactment of general and abstract rules of law but may also comprise regulations such as have been recognized by the Constitution. It is this secondary legislation which comes within the purview of delegation, for the formulation of such legislation may depend on technical knowledge. Therefore, Section 5 of Statute No. 230 of 1950 was not constitutionally invalid in so far

as it merely authorized the Government to extend the application of the provisions of the law to such areas as the Government may consider necessary and desirable. The Court emphasized the fact that the principles for the exercise of the discretion of the Government had been clearly laid down in the law, and, therefore, held that the law did not contravene the provisions of the Constitution.

There is no express prohibition against delegated legislation in the Indian Constitution. Nor is there any specific recognition of the doctrine of separation of powers. The question, therefore, arises whether the rule against delegated legislation is consistent with the basic principles of the Indian Constitution and to what extent it is applicable. At the outset it is necessary to distinguish between two aspects of the question. Delegation of legislative power may mean *transfer of the right* to enact laws to another authority or body of persons. In such a case the legislature divests itself of the authority vested in it, either generally or in respect of specified matters. Secondly, delegation may also mean the *transfer of the exercise* of legislative function. In this case the legislature does not transfer its title, nor does it totally abdicate its function. As regards the first, it is abundantly clear that neither the Union Parliament nor the Legislatures of the States can transfer their title to legislative power. Here lies the essential point of difference between the British Parliament and the Legislatures of the Indian Republic. The British Parliament is sovereign in every sense of the word, because it possesses not only plenary powers in respect of legislation but also enjoys and can exercise constituent powers. In other words, it can create new legislative organs and vest its power, either partially or totally, in such newly created organs. On the other hand, the Indian Constitution is a "controlled" constitution and the Union Parliament has no constituent powers except in the circumstances specified in Article 368. Nor such constituent powers can be claimed by the Legislatures of the States. This distinction was clearly recognized by Mukherjea, J. (afterwards C.J.) when he rightly observed that "as regards constitutionality of the delegation of legislative powers the Indian Legislature cannot be in the same position as the omnipotent British Parliament." [*In re Article 143, Constitution of India and Delhi Laws Act*, A.I.R. (1951) S.C. at p. 404]. The position under the Indian Constitution is, therefore, clear. Unlike the British Parliament, the Indian Parliament cannot divest itself of its legislative power and transfer it to any other

organ or authority. The same rule is more clearly applicable to the Legislatures of the States.

The position is, however, different in regard to the second aspect of the question, i.e. to what extent the exercise of the power to enact laws can be delegated to another body. The question has been examined at length in various judgements of the Supreme Court, and the following rules appear to be clearly established. In the first place, to use the words of Mukherjea, J. in the above mentioned case, "the Legislature must retain in its own hands the essential legislative functions which consist in declaring the legislative policy and laying down the standard which is to be enacted into a rule of law." In other words, the condition precedent to the validity of delegation is that the law must lay down the policy as well as the standard. Secondly, "the legitimacy of delegation depends entirely upon its being used as an ancillary measure which the Legislature considers to be necessary for the purpose of exercising its legislative powers effectively and completely." In other words, as the learned Judge points out, "what can be delegated is the task of subordinate legislation which by its very nature is ancillary to the Statute which delegates the power to make it." In *Edward Mills Co. v. State of Ajmer*, A.I.R. (1955) S.C. 25, the same learned Judge observed that "the primary duty of law-making has to be discharged by the legislature itself but delegation may be resorted to as a subsidiary or ancillary measure." These two rules are also to be found in the judgement of Mahajan, C.J. in *Harishankar Bagla v. Madhya Pradesh*, A.I.R. (1954) S.C. 465, where the learned Chief Justice observed as follows: "The Legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law. The essential legislative function consists in the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct."

It is, therefore, obvious that the test in every case must be whether or not the delegating law purports to transfer an essential legislative function. If it does not and the power delegated relates to subordinate or ancillary legislation, the law is valid and must be sustained. A typical instance is to be found in the recent case of *D. N. Ghosh v. Additional Sessions Judge*, A.I.R. (1959) Cal. 208, where the validity

of Section 9 of the Coal Mines Provident Fund & Bonus Scheme Act, 1948 was challenged on the ground that it constituted undue delegation of legislative power. The Section provided that any scheme framed under the Act may prescribe that any person who contravenes any of the provisions thereof shall be punishable with imprisonment for a term which may extend to six months or with fine amounting to Rs 1,000 or with both. Dealing with this plea the Court observed: "Prescribing an offence and its punishment is essentially a legislative act. But provided that this can be attributed to the legislative body, the actual working out of it can be delegated to a non-legislative body. . . . The legislative body, instead of prescribing the precise penalty, may also lay down the limit or standard, leaving it to the non-legislative body to prescribe the penalty within such limitation or in accordance with the standard laid down. In such a case where the non-legislative body avails itself of the power, it cannot be said that it has created the offence or prescribed the penalty." The Court, therefore, held that the delegation embodied in the impugned statutory provision was permissible.¹ This makes it clear that the question must depend on the circumstances of the case and the wording of the delegating legislation.

The application of the rule to a particular piece of legislation is not, however, always free from difficulties. Two important points have, however, been placed beyond doubt by the decision of the Supreme Court in the *Delhi Laws Act case*, A.I.R. (1951) S.C. 332. The first is "that to repeal or abrogate an existing law is the exercise of an essential legislative power" and such a power cannot, therefore, be delegated. The question was specifically raised in *Harishankar Bagla v. State of Madhya Pradesh*, A.I.R. (1954) S.C. 465. In that case the validity of Section 6 of the Essential Supplies (Temporary Powers) Act, 1946 was challenged on the ground that it was in contravention of the rule against delegated legislation. Section 3 of the Act authorized the Central Government to issue orders for regulating or prohibiting the production, supply and distribution of an essential commodity and trade and commerce therein. Section 4 empowered the Central Government to direct by notified order that the power to make orders under Section 3 may be exercisable also by an officer or authority

¹ It is interesting to note that in a case where the facts were almost similar the Supreme Court of Argentina has held that it is the legislature which must lay down that the infringement of a regulation constitutes an offence and must also prescribe the penalty. (Fallos 88, p. 231).

subordinate to the Central Government, or a State Government or officer or authority subordinate to a State Government. Section 6 provided that an order made under Section 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the Essential Supplies Act, 1946. It was contended that Section 6 authorized an executive government or an officer subordinate to it to repeal laws inconsistent with the provisions of orders issued by the executive government or the officer concerned. In rejecting this plea, Mahajan, C.J. observed as follows: "Section 6 does not either expressly or by implication repeal any of the provisions of pre-existing laws; neither does it abrogate them. Those laws remain untouched and unaffected so far as the statute book is concerned. The repeal of a statute means as if the repealed statute was never on the statute book. It is wiped out from the statute book. The effect of Section 6 certainly is not to repeal any one of those laws or to abrogate them. Its object is simply to bye-pass them." This argument does not, however, appear to be sound. If Section 6 of the Act did not expressly or in effect repeal the provisions of pre-existing laws, it did certainly suspend their operation in so far as they were inconsistent with an order issued under Section 3 of the Act. The suspension of the operation of a law is as much an essential legislative function as the repeal of the law, and could not, therefore, be delegated to an executive authority without contravening the rule against delegation as laid down by the Supreme Court in the *Delhi Laws Act case*. The plea of the invalidity of Section 6 was also repelled by the learned Chief Justice on another ground. He pointed out that even if the plea of implied repeal be accepted for the sake of argument, "the repeal is not by any act of the delegate, but the repeal is by the legislative act of the Parliament itself. By enacting Section 6 Parliament itself has declared that an order made under Section 3 shall have effect notwithstanding any inconsistency in this order with any enactment other than this Act. This is not a declaration made by the delegate but the legislature itself has declared its will that way in Section 6. The abrogation or the implied repeal is by force of the legislative declaration contained in Section 6 and is not by force of the order made by the delegate under Section 3." The learned Chief Justice, therefore, concluded that "there is no delegation involved in the provisions of Section 6 at all and that Section could not be held to be unconstitutional on that ground." It is submitted that this is the correct basis of the decision in that case.

The question of the application of the rule has also arisen with regard to the amendment of a law. Amendment or modification of a law is held to be an essential legislative function and cannot, therefore, be validly delegated. In the *Delhi Laws Act case*, A.I.R. (1951) S.C. 332, a distinction was, however, made by Mukherjea, J. (afterwards C.J.) between "amendment" and "modification". According to the learned Judge "modification" did not "mean or involve any change of policy but is confined to alteration of such a character which keeps the policy of the Act intact and introduces such changes as are appropriate to local conditions of which the executive government is made the judge." His view, therefore, was that a modification of this character did not fall within the meaning of essential legislative function. Bose, J. was equally emphatic on the question: "The power to 'restrict and modify' does not import the power to make essential changes. . . . To alter the essential character of an Act or to change it in material particulars is to legislate, and that, namely the power to legislate, all authorities are agreed, cannot be delegated by a legislature which is not unfettered." The majority view in that case, therefore, was that a statutory authorization to repeal laws already in force and to substitute in their places other laws with or without modification was repugnant to the Constitution. The position is, therefore, clear. Amendment or modification of the essential character of a law amounts to legislative function and cannot, therefore, be delegated. This view has been endorsed by the Supreme Court in *Rajnarain Singh v. Chairman, Patna Administration Committee*, A.I.R. (1954) S.C. 569 where the Court has laid down that "an executive authority can be authorized to modify either existing or future laws but not in any essential feature."

Construction of Legislative Grant. Under the Indian Constitution, the content as well as the extent of the power of the Legislatures depend primarily on the Legislative Lists embodied in the Seventh Schedule. The interpretation of the entries in these lists is, therefore, a matter of immediate concern. The question has been dealt with by the Supreme Court in several cases and the canons of interpretation relating to it are now beyond dispute. In the first place, as indicated by the Court in *Sri Ram Ram Narain v. State of Bombay*, A.I.R. (1959) S.C. 49, "it is well settled that these heads of legislation should not be construed in a narrow and pedantic sense but should be given a large and liberal interpretation." In laying down this rule, the Court cited with approval the dictum of the Privy

Council in *British Coal Corporation v. The King*, (1935) A.C. 500, that "in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted." The Court also referred to the judgement of the Federal Court in the *United Provinces v. Atiq Begum*, A.I.R. F.C. 16, where it was held that none of the items in the Legislative Lists is to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. The opinion expressed by the Court in *Navinchandra Mafatlal v. Commissioner of Income Tax, Bombay*, A.I.R. (1955) S.C. 58 was also to the effect that in construing an entry in any of the Legislative Lists the widest possible construction according to their ordinary meaning must be given to the words used in such an entry so that the legislative grant may have effect in its widest amplitude.

Another canon of construction is the rule of reconciliation. This is based upon the assumption that the respective spheres of legislation are not intended to be in conflict and do not in fact contradict one another. In *Citizens Insurance Company v. Parsons*, (1881) 7 A.C. 96, the rule was thus stated by the Judicial Committee of the Privy Council: "It could not have been the intention that a conflict should exist ; and in order to prevent such a result, the two sections must be read together and the language in one interpreted and, where necessary, modified by that of the other. In this way, it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections so as to reconcile the respective powers they contain, and to give effect to all of them." This rule was adopted by Gwyer, C. J. in interpreting the entries in the Legislative Lists under the Government of India Act, 1935 in the case of *C.P. & Berar Sales of Motor and Spirit Lubricants Taxation Act, 1938*, A.I.R. (1939) F.C. 1. In dealing with the question of interpretation of two entries, one of the Federal List and the other of the Provincial List, the learned Chief Justice observed that a reconciliation should be attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting and, where necessary, modifying the language of one by that of the other. He further observed: "If indeed such a reconciliation should prove impossible, then and only then will the non-obstante clause operate and the federal power prevail; for the clause ought to be regarded as a last resort." The same view was expressed by Lord Simonds in *Governor-General in*

Council v. Province of Madras, A.I.R. (1945) P.C. 98. There the question was whether the Madras General Sales Tax Act, 1939, which purported to levy a tax on first sales in Madras of goods manufactured or produced in India, came within Entry 48 of the Provincial Legislative List or was covered by Entry 45 of the Federal List of the Government of India Act, 1935. While upholding the validity of the legislation, Lord Simonds observed as follows: "It is right first to consider whether a fair reconciliation cannot be effected by giving to the language of the Federal Legislative List a meaning which, if less wide than it might in another context bear, is yet one which can properly be given to it, and equally giving to the language of the Provincial Legislative List a meaning which it can properly bear." As a result of the application of the rule of reconciliation, it was held that the legislation in question came within Entry 48 of the Provincial Legislative List and not under Entry 45 of the Federal Legislative List. It is also well established that for the purposes of reconciling two conflicting entries, reference to legislative practice is permissible for cutting down the meaning of a word or expression, as was done in the *C.P. & Berar Sales Tax case*, A.I.R. (1939) F.C. 1, or for enlarging its ordinary meaning, as in *State of Bombay v. Balsara*, A.I.R. (1958) S.C. 318. The rule of reconciliation as well as its corollary were endorsed by the Supreme Court in *Navinchandra Mafatlal's case*, A.I.R. (1955) S.C. 58, but the Court refused to accept the argument that the word "income" should be interpreted in the restricted sense which it had acquired in legislative practice in England and held that the word should be given its widest connotation in view of the fact that it occurs in an entry conferring legislative power.

Perhaps the most important canon of construction is the rule of pith and substance. This was evolved by the Judicial Committee of the Privy Council in dealing with cases arising under the Canadian Constitution, and is generally followed in interpreting the grant of legislative power under Sections 91 & 92 of the British North America Act, 1867. The rule was thus stated by Lord Atkin in the Irish case of *Gallagher v. Lynn*, (1937) A.C. 863: "It is well established that you are to look at the 'true nature and character' of the legislation, the 'pith and substance' of the legislation. If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field." A recent illustration of the rule is to be found in *Murphy v. Canadian Pacific*

Railways, (1956) 1 D.L.R. 197, where the validity of the Canadian Wheat Board Act was questioned on the ground that the legislation did not fall within the competence of the Dominion Parliament. The Act vested in the Canadian Wheat Board as agent of the Crown in right of Canada exclusive control over the inter-provincial and export marketing of grain and generally restricted the movement of grain in so far as the use of railways and elevators was concerned. The Court, while upholding the validity of the legislation, observed as follows: "What has to be determined is the true intent or aim of the law in question. The expression most commonly used is the 'pith and substance' of it. The Act purports to regulate a sector of Canada's trade and commerce, namely, the grain trade, and authority for this is specific. . . . The point is that the Parliament of Canada is justified in taking such steps as it considers necessary to effect the result which it has the right to attain. It seems to me that the Act is designed only to accomplish the object. . . . ; in other words, that the pith and substance of the Act is the regulation of trade and commerce."

The doctrine of pith and substance has been adopted by the courts in India. Thus, in *Dwarkanadas Shrinivas v. Sholapur Spinning & Weaving Co.*, A.I.R. (1954) 199, Mahajan, J. (afterwards C. J.) has laid down that "the Court has to look behind the names, forms and appearances to discover the true character and nature of the legislation." The rule was thus stated by Gwyer, C. J. in *Subramanyam Chettiar v. Muthuswami Goudan*, A.I.R. (1941) F.C. 47: "It must inevitably happen from time to time that legislation though purporting to deal with a subject in one list, touches also upon a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid, because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its 'pith and substance' or its 'true nature and character' for the purpose of determining whether it is legislation with respect to matters in this list or that." Similarly, in *In re Rupendra Prashad Saigal*, A.I.R. (1958), Andhra 63 where the proviso to Section 8 to the Bar Council Act, 1926 was challenged on the ground that the provision prescribes the payment of stamp duty which was not within the legislative competence of the Union Parliament, it was held by the High Court that the pith and substance of the legislation was to prescribe a machinery

for constituting Bar Councils for the enrolment of advocates and for taking proceedings for professional misconduct against them, and the payment of stamp duty was merely incidental to this object; and, therefore, it could not be said that the Union Parliament had purported to make a law in respect of an item beyond its competence.

The Effect of Unconstitutionality of Laws. It is almost an axiom of constitutional law, as pointed out by the Supreme Court of Mexico, that "the unconstitutionality of a law emanates from the conflict between it and the constitution or a certain constitutional precept." (*In re Antonio Torres*, Sem. jud. XXIX, p. 1611). Similarly, the Supreme Court of Argentina has laid down that "a judicial authority, which takes cognisance of a case, cannot declare a law unconstitutional unless there exists a clear and unquestionable opposition between it and the constitution under the authority of which it has been enacted." (*Servicio Aereo v. Municipalidad de Buenos Aires*, Fallos 226, p. 688). In other words, a law is unconstitutional if it directly contradicts any express provision of the Constitution or is repugnant to any rule or principle which flows from it by necessary implication. Four different classes of cases of unconstitutionality arise under the Indian Constitution. In the first place, a law enacted by the Union Parliament or the Legislature of a State may transgress the limits of the sphere of legislation demarcated by the Constitution. In such a case the Legislature concerned has no constitutional power to enact the law. Thus, under Articles 245 and 246 the power of the Union Parliament, although plenary, must be exercised within the ambit prescribed by the Constitution. Similarly, the Legislature of a State, although supreme within its sphere, is subject to the constitutional grant. In both cases the law is unconstitutional if it purports to go beyond the constitutional limits. Secondly, under Clause (1) of Article 13, all laws in force immediately before the commencement of the Constitution, in so far as they are inconsistent with any provision relating to fundamental rights, are void to the extent of such inconsistency. Similarly, under Clause (2) any law enacted by the Union Parliament or the Legislature of a State which infringes in any manner any fundamental right is void to the extent of such infringement. Any such laws are, therefore, unconstitutional. Thirdly, as we have already seen, if there is a repugnancy between a federal law and a State law, the federal law prevails and the State law is void to the extent of the repugnancy. Here again the law of the State which is

repugnant to a federal law is an unconstitutional law. Fourthly, any law, whether enacted by the Union Parliament or the State Legislature, which is contrary to any provision of the Constitution, either express or implied, is an unconstitutional law.

The question now arises: what is the effect of the unconstitutionality of a law. As regards cases where unconstitutionality arises from lack of legislative power, the position appears to be clear beyond doubt. A law which a legislature has no power to enact is no law at all and is, therefore, void *ab initio*. Is the same rule applicable to other cases of unconstitutionality? The point was specifically dealt with by the Supreme Court in *Behram Khurshid v. State of Bombay*, A.I.R. (1955) S.C. 123. The view of the majority of the Court was that a declaration of unconstitutionality brought about by lack of legislative power does not stand on a different footing from a declaration of unconstitutionality brought about by reason of abridgement of fundamental rights. In dealing with this issue, Mahajan, C. J. observed as follows: "We think that it is not a correct proposition that constitutional provisions in Part III of our Constitution merely operate as a check on the exercise of legislative power. It is axiomatic that when the law-making power of the State is restricted by a written fundamental law, then any law enacted and opposed to the fundamental law is in excess of the legislative authority and is thus a nullity. Both these declarations of unconstitutionality go to the root of the power itself and there is no real distinction between them. They represent but two aspects of want of legislative power." The learned Chief Justice further pointed out that the legislative power of the Union Parliament and of the State Legislatures as conferred by Articles 245 and 246 of the Constitution stands curtailed by the provisions of the fundamental rights, and that the wording of Article 13 (2) is sufficient to indicate that neither the Union Parliament nor the Legislature of a State is *competent* to make a law which infringes any fundamental right conferred by the Constitution. Following the decision of the Court in *Kesava Madhava Menon's case*, A.I.R. (1951) S.C. 128, the majority of the Court laid down the following propositions in respect of a law which is in conflict with a fundamental right. First, any law enacted after the commencement of the Constitution which infringes any fundamental right is governed by the American rule that if a statute is repugnant to the Constitution, the statute is void from its birth. Second, a law enacted before the commencement of the Constitution, which is in conflict with Part III of the

Constitution, is not void *ab initio* and for all purposes, because Article 13 has no retrospective effect. But after the commencement of the Constitution, "the effect of Article 13 (1) on such repugnant laws was that it nullified them, and made them ineffectual and nugatory and devoid of any legal force or binding effect." In other words, the result is that the part of an existing law which is unconstitutional being in conflict with a fundamental right is not law and is null and void. Mahajan, C.J. thus stated the proposition: "For determining the rights and obligations of citizens the part declared void should be notionally taken to be obliterated from the section for all intents and purposes, though it may remain written on the statute book and be a good law when a question arises for determination of rights and obligations incurred prior to 26 January, 1950 and also for the determination of rights of persons who have not been given fundamental rights by the Constitution."

This view of the matter appears to have been substantially modified by the majority of the Supreme Court in *Bhikaji Narain Dhakras v. State of Madhya Pradesh*, A.I.R. (1955) S.C. 781. In that case the impugned Act was an existing law at the time of the commencement of the Constitution. It was impugned on the ground that it imposed on the exercise of a fundamental right guaranteed to the citizens of India restrictions which could not be justified as reasonable. The law, therefore, became void to the extent of the inconsistency. In the meanwhile the provision of the Constitution which was in conflict with the law was amended by the Constitution (First Amendment) Act, 1951. The question, therefore, was what was the effect of the constitutional amendment on the impugned provision of the Act. It was held by the majority of the Court that the impugned Act ceased to be inconsistent with the fundamental right as soon as the constitutional amendment came into force and it became operative again even as against the citizens. In delivering the judgement of the majority, Das, A.C.J. observed as follows: "Article 13 (1) by reason of its language cannot be read as having obliterated the entire operation of the inconsistent law or having wiped it out altogether from the statute book. Such law existed for all past transactions and for enforcement of rights and liabilities accrued before the date of the Constitution, as was held in *Kesava Madhava Menon's case*. The law continued in force, even after the commencement of the Constitution, with respect to persons who were not citizens and could not claim the fundamental right." The view was that the impugned law became,

as it were, eclipsed, for the time being, by the fundamental right. The law was not dead for all purposes. It existed for the purposes of pre-Constitution rights and liabilities and remained operative, even after the Constitution, as against non-citizens. It was only against the citizens that the law remained in a dormant or moribund condition, but after the constitutional amendment it became fully operative. The learned Chief Justice also pointed out that the American authorities refer only to post-Constitution laws which were inconsistent with the provisions of the Constitution.¹ Such laws never came to life but were still-born. Therefore, the American authorities cannot fully apply to pre-Constitution laws which were perfectly valid before the Constitution. He also expressed the view that even apart from this distinction between pre-Constitution and post-Constitution laws, the American authorities can have no application under the Indian Constitution.

It will be noticed that although the actual decision in the case related to an existing law, the views expressed by the learned Chief Justice covered both pre-Constitution and post-Constitution laws. These views were followed by Chagla, C.J. in *Ready money Ltd. v. State of Bombay*, A.I.R. (1958) Bom. 181. In that case the impugned legislation was a post-Constitution law, but Chagla, C.J. held that the same rule was applicable. In dealing with the issue he observed: "The law as now formulated by the Supreme Court in *Bhikaji's* case is clear and that is that where you are dealing with a pre-Constitution or a post-Constitution Act, if the Act has been passed by a competent Legislature and the constitutional infirmity only arises by reason of the fact that it is inconsistent with Part III of the Constitution, to the extent of that inconsistency, the Act is moribund and cannot be given effect to, but if the provision of the Act at any time ceases to be inconsistent with the fundamental rights, then it becomes revived or revitalized and can have full force and effect." In other words, according to this view, a law which infringes a fundamental right is not "void" despite the express wording of Clause (2) of Article 13, but is merely inoperative so long as the inconsistency exists.

The following conclusions clearly emerge from the two decisions referred to above. First, the unconstitutionality of a law which results from lack of legislative power has not the same effect as the unconstitutionality which results from a conflict between a law and a fundamental right. In the first case, the law is null and void and has

¹ This is not entirely accurate. See, for instance, *United States v. Villato*, 2 Dall. 370, 1 L. ed. 419.

no effect whatsoever. Secondly, where the unconstitutionality of a law arises from a conflict between a law and a provision of the Constitution relating to a fundamental right, the law does not become void but its operation is merely suspended so long as the inconsistency continues. In other words, it comes into force and effect as soon as the inconsistency is removed by a valid legislation.

It is evident that the views expressed in these two cases are diametrically opposed to the earlier decision of the majority of the Supreme Court in *Behram Kurshid v. State of Bombay*, A.I.R. (1954) S.C. 123. Indeed, Chagla, C. J. has held that the earlier decision of the Supreme Court has been overruled, if not expressly, by implication by the later decision of the Supreme Court in *Bhikaji's case*. It is difficult to accept this view as the principle of *stare decisis* is generally acceptable in all such cases and the earlier decision of the Supreme Court could not be overruled by mere implication. However, it is necessary to examine the *ratio decidendi* of the judgement of the majority of the Supreme Court in *Bhikaji Narain Dhakras v. State of Madhya Pradesh*, A.I.R. (1955) S.C. 381 and of the Bombay High Court in *Ready money Ltd. v. State of Bombay*, A.I.R. (1958) Bom. 181. An examination of the judgement of the Supreme Court in *Bhikaji's case* does not, however, reveal any detailed argument in support of the conclusion arrived at by the Supreme Court. While Das, A.C.J. asserted that Article 13 (1) cannot by reason of its language be read as having obliterated the entire operation of the inconsistent law, he did not give any reason why the language of Clause (2) of the same Article should be construed not according to the primary and natural meaning of the words but in a restricted and artificial sense. Chagla, C. J., on the other hand, has set forth two arguments in support of the later judgement of the Supreme Court. He asserts that a distinction between a law which is bad on the ground that it is *ultra vires* of the Legislature and a law which is invalid as contravening fundamental rights is vital and fundamental. According to him, in the first case the law is a nullity, is bad from its inception and nothing can be done to cure that law. In the second case, he points out, the position is different. "In the case of a violation or infraction of fundamental rights, before it is decided that there has been such violation or infraction, an investigation has to be held because whether a restriction is reasonable or not has been made justiciable and the Court has to decide after consideration of various circumstances whether the restriction imposed by the Legislature is justifiable or not." It is submitted

that this argument will not bear scrutiny. In fact, the position is the same in both cases, as the allegation of unconstitutionality has to be examined by the Court in either case and an investigation is necessary whether a law is impugned on the ground of *ultra vires* or on that of infringement of a fundamental right. The second argument advanced by the learned Judge is that "in the case of a law which is passed by a Legislature which is incompetent, the law is totally void from its inception. In the other case, where the law is passed by a competent Legislature contravening fundamental rights, the law may still be good in case of those fundamental rights which are only guaranteed to citizens, as regards non-citizens." It is submitted that this argument is equally unsound. All fundamental rights under Part III of the Indian Constitution are not exclusively intended for citizens only. Some of them are available to all persons, whether citizens or not, as, for instance, under Article 14 of the Constitution. Is it intended that such cases, where the entire provision of a law is affected, should be differentiated from other cases of infringement of fundamental rights which are available to citizens only? If the answer is in the affirmative, then it leads to an absurdity. If, on the other hand, there is to be no distinction between these two classes of fundamental rights, then there is no substance in the argument advanced by the learned Judge, for, strictly speaking, there can be no difference between a law which is *ultra vires* and a law which infringes any fundamental rights available to all persons: in both cases, if the laws are post-Constitution laws, they would be totally void. Thirdly, the learned Judge argues that a petitioner who comes to court complaining of violation of his fundamental rights must establish his case as at the date of petition, whereas in the case of an incompetent legislation no rights whatever can flow from that legislation. This argument, it is obvious, is also devoid of any substance. The distinction which the learned Judge makes between the two cases has no relation whatsoever to the effect of the unconstitutionality of a law. If, in the first case, the petitioner has to establish the factum of violation of his fundamental right, in the second case he has also to establish that the rights claimed by the opposite party arise under a legislation which is *ultra vires*. There is, therefore, no difference between the two cases in point of law or substance.

There is another conclusive argument against the views expressed in the two cases referred to above. The conclusion drawn by Das, A. C. J. and Chagla, C. J. of the Bombay High Court may be accep-

ted as consistent with the wording of Clause (1) of Article 13 of the Constitution, but it totally disregards the clear and emphatic text of Clause (2) of the same Article. As Mahajan, C. J., has rightly pointed out in *Behram Khurshid's case*, "a mere reference to the provisions of Article 13 (2) and Articles 245 and 246 is sufficient to indicate that there is no competency in Parliament or a State Legislature to make a law which comes into clash with Part III of the Constitution after the coming into force of the Constitution. Article 13 (2) is in these terms: 'the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this Clause shall, to the extent of the contravention, be void'. This is a clear and unequivocal mandate of the fundamental law prohibiting the State from making any laws which come into conflict with Part III of the Constitution." In the face of the clear wording of the Clause, the view expressed by the learned Chief Justice that both kinds of declarations of unconstitutionality go to the root of legislative power itself and that there is no real distinction between them, cannot legitimately be challenged. In other words, it is absolutely clear that the conclusion reached by Das, A. C. J. in *Bhikaji's case* and the decision of the Bombay High Court in *Readymoney's case* are not consistent with the express provisions of the Constitution. Further, the term used in Clauses (1) and (2) of Article 13 is "void" and it must according to its ordinary sense mean a nullity or having no legal force whatsoever. If, however, the word is to be interpreted in a restricted sense, then there must be substantial reasons for such a narrow interpretation. Moreover, the universally accepted rule is that every interpretation must be *pro libertatis*, but the construction which has been placed upon the word "void" in *Bhikaji's case* by the majority of the Supreme Court and by the Bombay High Court in *Readymoney's case* is clearly in contravention of this well-established rule of interpretation since it operates against the fundamental right of an individual. It is no doubt true that the word "void" has sometimes been interpreted in a restricted sense as, for instance, in *Valentini v. Candli*, (1889) 42 Q.B.D. 166, where the word was held to mean "voidable" in the interest of justice. But "in all these cases the intention of the legislature was considered as completely carried out by the restricted scope given to its enactments." (Maxwell, *op. cit.*, p. 212). Where, however, the policy of an enactment is clear as is also the language, the word "void" must receive its primary and natural meaning: *Pearse v. Morrice* (1834) 2 A. & E. 84. In the present case the policy of

the Constituent Assembly is clear beyond doubt and the wording of Clauses (1) and (2) of Article 13 is equally clear and emphatic. There is, therefore, no justification for adopting a restrictive interpretation.

Analogous Law. We have already seen that Das, A.C.J. asserted in *Bhikaji's case* that the American rule does not apply under the Indian Constitution, but no reasons were advanced by him in support of this opinion. Under the Constitution of the United States, an unconstitutional law is deemed to be one which is in violation of any provision of the Constitution and has, therefore, been held to be entirely null and inoperative. In *Norton v. Shelby County*, 118 U.S. 425, the rule was thus stated by the Supreme Court: "An unconstitutional act is not a law. It confers no rights; it imposes no duties; it affords no protection; it creates no office. It is, in legal contemplation, as inoperative as though it had never been passed." But this rule is subject to the exception that if a statute which has once been declared to be invalid by the final court, is held to be valid by a subsequent decision, the statute is revived and must be treated as having been constitutional from its inception. It has further been held that a law which was unconstitutional at the time of its enactment cannot be revived by a subsequent change in the Constitution, but if the legislature desires it to be in force it must be re-enacted: *Stockyards National Bank of South Omaha v. Baumann*, 5 F. 905. Like the Constitution of the United States, the Commonwealth of Australia Act does not contain any express provision regarding this matter. However, the generally accepted view is that a law, whether enacted by the Commonwealth Parliament or a State Legislature, is *ultra vires* and void if it is contrary to the provisions of the Constitution. But although the law becomes a dead letter, "in the event of a subsequent suit being brought under the enactment and the Court's not following its earlier judgement, the statute will stand in full force and effect because it has never, legally, been repealed." (Wynes, *op. cit.*, pp. 38-39). There is, however, no direct decision on this point, but reference has been made to the judgement of the High Court of Australia in *Carter v. Egg & Egg Pulp Marketing Board*, 66 C.L.R. 557. In that case one of the questions raised was whether the provisions of two statutes of the State of Victoria were inconsistent with a Commonwealth statute, and although the Court held that there was no inconsistency, two of the judges expressed their views regarding the precise effect of inconsistency between a federal law and a State law. Thus, for instance, Latham, C.J. observed as follows in regard to the scope of Section

109 of the Australian Constitution: "The word 'invalid' in this section cannot be interpreted as meaning that a State law which is affected by the section becomes *ultra vires* in whole or in part. If the Commonwealth law were repealed, the State law would again become operative. . . . Thus, the word 'invalid' should be interpreted as meaning 'inoperative'. This is, I think, made clear by the provision that the Commonwealth law 'shall prevail'—that is, the Commonwealth law has superior authority and takes effect to the exclusion of the inconsistent State law." A similar observation was made by Williams, J.: "If there is any inconsistency between the rights of the Commonwealth and of the Board with respect to these eggs, the two laws will then come into collision and the Commonwealth law will prevail. This will not effect a repeal of the Victorian Acts. They could only be repealed by the Victorian Parliament. But so long as the inconsistency exists the Victorian Acts will be inoperative." It will be noticed that these *obiter dicta* refer exclusively to a case of inconsistency between a Commonwealth law and a State law and has, therefore, no bearing on other cases of unconstitutionality. On the other hand, the Supreme Courts of Argentina and Mexico have followed the American view and held that an unconstitutional law is null and void and has no legal effect whatsoever.

We have so far been dealing with constitutions which do not contain any express provision regulating the matter. The position under the Italian Constitution is somewhat different. Article 134 of the Constitution authorizes the Constitutional Court to adjudicate upon all controversies relating to the constitutional validity of a law, whether enacted by the State or by a Region. Moreover, Article 136 lays down that "when the Constitutional Court declares the constitutional invalidity of a rule of law or of a regulation having the force of law, the rule ceases to have any efficacy from the date following the publication of the decision." The question was examined by the Constitutional Court in the very first case which came before it, and the following pertinent observation was made by the Court on the subject: "The two legal institutions of repeal (*abrogazione*) and constitutional invalidity of laws are not identical; they operate on different planes, with different effects and with different jurisdiction. Besides, the field of repeal is more restricted in comparison with that of constitutional invalidity, and the conditions necessary for repeal on grounds of incompatibility according to the general principles are much more limited than those which authorize the declaration of

constitutional invalidity." (*In re Enzo Cattani*, 1956, Judgements of the Constitutional Court, No. 1). The following principles have been deduced from this decision of the Constitutional Court. First, the conflict between the Constitution and a law, whether enacted before or after the Constitution, is always a case of constitutional invalidity. Second, where a law was enacted before the Constitution, the conflict may be considered as a case of repeal on the ground of incompatibility in accordance with the general principles. Third, the notion of repeal on the ground of incompatibility is always implicit in the much larger concept of constitutional invalidity.¹ It has been argued that a declaration of constitutional invalidity by the Constitutional Court does not lead to the nullity of the impugned legislation, which continues to remain alive, only losing its efficacy.² The precise effect of Article 136 was examined by the Supreme Court (*Corte di Cassazione*) in *Ente provinciale Turismo Verelli v. Società Fila*, Giur. Cost. 1958, p. 1089. It was held by the Court that a declaration of constitutional invalidity must be understood to mean that it leaves untouched all effects which were irrevocably brought about on the basis of the law declared to be unconstitutional but affects all legal situations which have not yet been completed. In other words, matters which have been finally decided by a court of law on the basis of the impugned legislation are not affected by a declaration of unconstitutionality. The correct view, therefore, appears to be that once the Constitutional Court has declared that a law is constitutionally invalid, whether enacted before or after the commencement of the Constitution, the law ceases to be operative for all purposes and cannot be revived by a constitutional amendment.

Conclusions. Article 245 of the Indian Constitution expressly lays down that the legislative power of the Union Parliament and of the State Legislature, is "subject to the provisions of this constitution". In other words, the grant of legislative power does not authorize either the Union Parliament or the Legislature of a State to contravene any provision of the Constitution, although the power is plenary within the ambit demarcated by the Constitution. It is, therefore, clear that the constitutional prohibitions are an abridgement of the legislative power. Consequently, whether a law violates any prohibition or transgresses the limits prescribed by Articles 245 and 246, it is always a question of lack of power. The result is that

¹ Esposito, *Illegittimità Costituzionale E Abrogazione*, Giur. Cost. 1958, p. 829.

² Petrucci, *La Corte Costituzionale*, Commentario sistematico, Vol. II., at p. 486.

when a legislature enacts a law beyond its power or in excess of power, the law is a nullity *ab initio*, and if it is null and void at its very inception, there can be no question of its revival by a constitutional amendment. This legal consequence must ensue whether the law contravenes the limits imposed by Articles 245 and 246 or infringes any other prohibition embodied in the Constitution including the provisions in Part III. This is because the universally accepted rule is: *defectus potestatis nullitas nullitatem*. It would accordingly follow that the view expressed by Das, A. C. J. in *Bhikaji's case* is directly opposed to this basic principle. The principle was clearly recognised by Mahajan, C. J. in *Behram Khurshid's case* where the learned Chief Justice laid down that a declaration of the unconstitutionality of a law, whether on the ground of lack of power or that of infringement of a fundamental right, goes to the root of the power itself and there is no real distinction between the two cases as they merely represent two aspects of want of legislative power. It is clear that the same view has been adopted by the Supreme Court of the United States, for it has held that a law which is unconstitutional at the time of its enactment cannot be revived by a subsequent change in the Constitution. (See *Baumann's case* cited above). The same rule would appear to obtain under the Constitution of Argentina which has been held by the Supreme Court to embody "a system of government the essence of which is the limitation of the powers of the various organs and the supremacy of the Constitution." It has also been held that the provision in respect of a fundamental right is "*una clausula especial limitativa del poder*" (Fallos 137, p. 47). The common consensus of juristic opinion appears to be that if a law infringes a fundamental right or transgresses the grant of legislative power, it is always a question of lack of power and such a law, being unconstitutional, is null and void. The conclusion is inescapable that the decision of the Bombay High Court in *Ready-money's case* is both logically and legally unsound.

The following propositions clearly emerge from the foregoing discussion. First, if a law, whether federal or State, contravenes the provisions of Articles 245 and 246, or infringes any provision of Part III of the Constitution or any other provision, it is a nullity at its inception if enacted after the commencement of the Constitution, and cannot be revived by subsequent constitutional amendment. Second, if a law, enacted before the commencement of the Constitution, infringes any provision of the Constitution, it becomes inoperative to the extent of the infringement after the commencement of the Cons-

stitution. In such a case, however, the unconstitutional law is not void but inoperative and can be revived if the defect is removed by subsequent constitutional amendment, because the legislature concerned had the power to enact the law at the time of its enactment. The judgement of the majority of the Supreme Court in *Bhikaji's case* does, however, lay down that the rule of revival or the doctrine of eclipse applied to both post-Constitution and pre-Constitution laws. This view has been rejected by the majority of the Supreme Court in *Deep Chand v. State of U.P.*, A.I.R. (1959) S.C. 648. In that case it has been held that there is a clear distinction between the two clauses of Article 13. Clause (2) of the Article states in clear and unambiguous terms that no State shall make any law which takes away or abridges any fundamental rights. Therefore, dissenting from the views expressed by Das, C.J. in *Bhikaji's case*, the majority of the Court has held that "the doctrine of eclipse has no application to post-Constitution laws infringing the fundamental rights as they would be *ab initio* void *in toto* or to the extent of their contravention of the fundamental rights." On the other hand, the majority has also laid down that "under Clause (1) a pre-Constitution law subsists except to the extent of its inconsistency with the provisions of Part III," and, therefore, the doctrine of eclipse is applicable and a pre-Constitution law, which is void on the ground of its infringement of a fundamental right, can be revived if the constitutional defect is removed. "The doctrine of eclipse can be invoked only in the case of a law valid when made, but a shadow is cast on it by supervening constitutional inconsistency or supervening statutory inconsistency; when the shadow is removed, the impugned Act is freed from all blemish or infirmity."

The correctness of the decision may, however, be seriously questioned. Both Clauses (1) and (2) of Article 13 expressly declare that a law which contravenes any provision of Part III of the Constitution is void. The word "void" must bear the same meaning, whether the question arises under Clause (1) or under Clause (2) of the Article. We have already pointed out that the word must be given its full and natural meaning so far as Clause (2) of the Article is concerned. It must, therefore, be given the same meaning when a question arises under Clause (1). In other words, in both cases the conflicting law must be a nullity. As the Italian Constitutional Court has rightly pointed out, "it is inconceivable that the legislature should use in the same Article the same technical expression in two different senses." (*Società Squinzano v. Ministero Finanze*, Giur. Cost.

1958., at p. 535). Moreover, according to the generally accepted judicial view, the word "void" must be given its primary meaning unless there are strong reasons justifying a narrower interpretation. The conclusion is, therefore, irresistible that if a law infringes any fundamental right, it is a nullity to the extent of the infringement, whether it was enacted before or after the commencement of the Constitution. The same rule, it is submitted, is applicable to other cases of unconstitutionality.

We have already discussed the rule of severability in connexion with the paramountcy of federal legislation. The rule is equally applicable to other cases of unconstitutionality. As regards breaches of fundamental rights, the rule of severability has been made expressly applicable by the wording of Article 13 of the Indian Constitution which declares that a law which violates a fundamental right is void only to the extent of the violation. The rule of severability also applies to cases where the unconstitutionality of a law arises from lack of legislative power. [*Gopalan v. State of Madras*, A.I.R. (1950) S.C. 27]. As we have already indicated, the rule of severability lays down that when a provision of a statute is contrary to a provision of the Constitution, the entire statute is not unconstitutional but only the provision which contravenes it provided that such a provision can be separated from the other provisions of the statute. But a statute is void in its entirety if "all the provisions are connected in subject matter, depending on each other, operating together with the same purpose, or otherwise so connected together in meaning that it cannot be presumed that the legislature would have passed the one without the other." (Cooley, *op. cit.*, pp. 246-7). Therefore, if the invalid provisions of a statute "are essentially and inseparably connected in substance" with the valid provisions, the question of the application of the rule of severability does not arise. Thus, where a law purports to authorize the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislation, the law cannot be upheld so far as it may be applied within the constitutional limits as it is not severable. [*Ramesh Thapar v. State of Madras*, (1950) S.C.J. 418]. Similarly, the rule is not applicable where the valid portions of a statute are merely ancillary to the invalid portions. In other words, in every case of unconstitutionality the question to be determined is what is the intention of the legislature. It has been suggested that the test of severability is "whether the

Statute with the invalid portions omitted would be a substantially different law as to the subject matter dealt with by what remains from what it would be with the omitted portions forming part of it." (per Griffiths C.J. in *Whybrow's Case*, 11 C.L.R., at p. 27.) This test of novelty is now generally accepted. Thus, the Supreme Court of India has held that as the omission of the unconstitutional section of a statute did not "change the nature or the structure or the object of the legislation", the unconstitutionality of the section did not affect the validity of the rest of the Act. [*Gopalan v. State of Madras*, A.I.R. (1950) S.C. 27].

CHAPTER VII

EXECUTIVE POWER OF THE UNION AND STATE GOVERNMENTS

The Meaning of Executive Power. We have already seen that the doctrine of separation of powers has been translated into a positive rule of the technique of constitution-making since the Declaration of Rights made by the French Constituent Assembly in 1789; and that every constitution now embodies the tripartite division of powers into the legislative, executive and judicial. The co-existence of two sets of co-ordinate and equal governments in a federal State, therefore, necessarily implies not only the distribution of legislative power, but also the partition of executive power between the central government, on the one hand, and the component units, on the other.

We have already discussed the principles in accordance with which legislative power in a federal State is distributed. Before we survey the various systems of division of executive power, it is necessary to examine the exact import and significance of the term. The founders and protagonists of the doctrine of separation of powers have always emphasized the intimate relation between legislative and executive powers. Locke, for instance, describes executive power as "the power to execute laws". Montesquieu speaks of "*la puissance exécutrice*". This view has generally been accepted by modern publicists with or without amendment. Thus, Vittorio Orlando, one of the leaders of the Italian School, draws a distinction between the power to declare juridical norms which should regulate both public and private relations, and the power to secure, even by means of external force, the due observance of those norms. (Op. cit., p. 81) This view, however, is not entirely accurate. Strictly speaking, executive power includes two distinct and separate elements: the first relates to the legislative content of executive power, and the second deals with those discretionary and mandatory acts which pertain to government, using the word in its strictest sense. Kant, for instance, defines

executive power (*potestas rogatoria*) as "government in conformity with law". Jellinek follows the same principle and distinguishes between the executive element of administration and its governmental element. (See Villeneuve, *op. cit.*, p. 88)

The legislative content of executive power may be analysed as follows. The first is collaboration with the legislature in the making of laws. This may take the form either of legislative initiative, as in the United Kingdom, or of recommendations to the legislature, as in the United States of America. In England legislative initiative is today the monopoly of the executive, and parliamentary initiative has become a relic of the past. Legislative initiative of the executive authority is also preponderant under the French constitutional system. In Argentina and Brazil the initiative has been expressly conferred on the executive authority by the Constitution. The position in India corresponds to the practice prevailing in the United Kingdom. Second, the power to promulgate laws. In several constitutions this power has been expressly conferred on the executive, as under the Italian Constitution of 1947. It is almost a universal rule of constitutional law and practice that no law can come into operation until and unless it has been promulgated. (See, for instance, the decision of the Court of Cassation of Rome in *Volpicelli v. Aliberti*, *Giur. it.* 1919, I., 840; see also the judgement of the Supreme Court of Mexico in *In re Manuel Perez*, *Sem. jud.* XXXVI., p. 1125). Thirdly, application or enforcement of laws. This is the most important element of the legislative content of executive power. It authorizes the government not only to enforce laws but also to issue directions and to make rules and regulations for implementing the execution of laws. This *poder regulamentor*, as it has been called by constitutional jurists in the Latin American States, is in the nature of legislative power. It derives its source either from express provisions of the Constitution, as in Argentina and Brazil, or is an implied result of the constitutional grant of powers. To these elements may also be added what has been called the ordinance-making power (*diritto di ordinanza*) of the executive government. This power is sometimes expressly conferred by the Constitution, as in India and Brazil, or is considered to be an ancillary power of the executive authority, as in the United States of America.

The "governmental element" of executive power comprises, in the first place, direction and control of internal affairs of the State. This includes (i) formulation of policies; (ii) appointment and dismissal

of State functionaries; (iii) issue of directions and orders to subordinate functionaries; (iv) command of the entire power of the State, both army and police; and (v) the grant of pardon. Secondly, it embraces direction and control of the external relations of the State. This includes (i) the making of war and peace; (ii) the appointment of diplomatic and other agents; (iii) the conclusion of treaties and conventions; and (iv) representation at international conferences.

The System of Co-extensive Powers. The foregoing analysis of executive power clearly indicates the importance of the connection between legislative and executive powers. It follows, therefore, that the partition of executive power between a federation and its member States is conditioned by the distribution of legislative power. An examination of federal constitutions shows that three different solutions have been found to this important problems. According to the first, the executive authority of the central government is co-extensive with its legislative power. The executive power of the constituent units is also governed by the same principle. Thus, Section 61 of the Commonwealth of Australia Act defines the ambit of the executive power of the Commonwealth by expressly declaring that it "extends to the execution and maintenance of this Constitution and the laws of the Commonwealth." It has been laid down by the High Court of Australia that "the mere fact of the creation of the executive Government carries with it some constitutional consequence, unwritten, it is true, but nevertheless very real, that Courts recognize, and they are included in the terms 'maintenance of the Constitution'." (Wynes, *op. cit.*, p. 318) The second source of the executive power of the Commonwealth is derived from Commonwealth statutes. It should, however, be remembered that it is not entirely accurate to assume that the executive power of the Commonwealth is co-extensive with its legislative power, because this principle is strictly limited to cases of exclusive grant; and in respect of concurrent powers executive authority is retained by the States until ousted by Commonwealth legislation. Under the Canadian Constitution, there is no express provision regarding this matter; it is, however, true to say that in Canada the executive power of the Dominion is co-extensive with its legislative power, and this embraces the fields of exclusive and concurrent powers, as residuary powers are retained by the Dominion Government and the Provinces have no power other than those expressly conferred on them. (Lefroy, *op. cit.*, p. 24) The American Constitution also contains no express provision

regarding the extent of the executive authority of the Federal Government. Article 2, however, vests the executive power of the Federation in the President of the United States. Under the same Article, he is required to take the oath that he will "faithfully execute the office of the President of the United States, and will to the best of my ability, protect and defend the Constitution of the United States." Section 3 of this Article imposes the further obligation on him that he shall take care that "the laws be faithfully executed". These provisions make it quite clear that the executive power of the Federal Government embraces the entire field of its legislative power. There is, therefore, in the United States of America, as in Australia and Canada, a hierarchy of executive agents armed with the power to enforce federal laws, administrative decrees and judgements directly against individual citizens. The *raison d'être* of this system is to be found in the judgement of Marshall, C. J. in *McCulloch v. Maryland*, 4 Wheat. 316, where it was laid down that there can be "no dependence of the Government of the Union on the Government of the States for the execution of the great powers assigned to it." However, during the Second World War and the critical period immediately preceding it, a large number of federal regulations were executed by the administrative agents of the States, and what is more remarkable is that under a system of federal subvention the Union authorities were invested with the power to inspect and supervise the use of the financial concessions granted by the Union Government; in other words, while the administration was vested in the States, it was subject to the regulation of the federal authorities. Thus, without any formal change, there was introduced a system of federal supervision and inspection contrary to the general practice obtaining under the Constitution.

The same method has been adopted in Argentina and Brazil. Under the Brazilian Constitution, the executive power of the Federation is exercised by the President who has express authority to execute the laws of the Federation. There is, therefore, an organized system of federal authorities enforcing federal laws throughout the territory of the Union. But under Clause (3) of Article 18 of the Constitution, the Union Government may entrust the execution of federal laws to officials of the State Governments. Article 110 of the Constitution of Argentina specifically states that "the Governors of the Provinces are the natural agents of the Federal Government for the enforcement of the Constitution and the laws of the Nation." In fact, however,

the execution of federal laws is exclusively carried out by officers of the Federal Government throughout the territories of the Federation, without any interference by the authorities of the States.

The Method of Mediatised Administration. Under this system executive power is co-extensive with legislative authority but the actual *exercise* of executive power is shared by the Federation with the constituent units but subject to its control. This method, is, however, prevalent only in regard to certain specified subjects within the exclusive legislative competence of the federal government; and in regard to other matters the administration remains exclusively vested in the hands of the federal authorities. We have already seen that during the Second World War this method was partly adopted in the United States of America. The same system obtains under the Swiss Confederation as well as under the Soviet Constitution. Under Article 102 of the Swiss Constitution, the Federal Executive is required to provide for "the execution of the laws and decrees of the Confederation and the judgements of the Federal Tribunal, and also the compromises or decisions in arbitration upon disputes between Cantons." The Constitution, however, introduces the second system in regard to two specific matters. In the first place, Article 20 provides that whereas the laws relating to the organization of the army are within the competence of the Confederation, the execution of such laws vested in the Cantonal authorities "within the limits prescribed by federal legislation and under the supervision of the Confederation." Secondly, under Article 69 (a) the Cantons have been entrusted with the execution of the laws enacted by the Confederation in regard to food-stuffs, household commodities and articles of general use in so far as they may be dangerous to health or life. Apart from these specific instances of mediatised administration, in actual practice the exercise of the authority of the Federal Executive has also been confined to a limited number of subjects, such as organization of railways, posts, customs, and monopoly of alcohol, leaving the execution of all other federal laws in the hands of the Cantonal authorities. The administrative agents appointed for these purposes and created by Cantonal laws are deemed to be Cantonal functionaries and not directly subject to the control of the Federal Government.

The Constitution of the U.S.S.R. has adopted a similar pattern of distribution. The Praesidium of the Supreme Soviet, which is a collective body, corresponds to the Head of State under other Con-

stitutions, and enjoys executive powers analogous to those which are usually vested in the Head of State. It is not, however, a purely executive body but possesses judicial powers in respect of federal laws: a relic of the Constitution of 1924 which was founded upon the principle of "dimension of power" under which all forms of power, whether executive, legislative or judicial, were vested in each organ of the Soviet system.¹ The real executive authority has, under the Soviet Constitution, been conferred on the Council of Ministers, which is declared to be "the highest executive and administrative organ" of the Soviet Union. Under Article 66, the Council of Ministers issues decisions and orders on the basis, and in pursuance, of the laws in operation, and supervises their execution; in other words, the executive authority of the Soviet Union is co-extensive with its legislative powers. But in respect of the actual exercise of the executive power, two different methods have been adopted, as under the Swiss Confederation. The Council of Ministers consists of two different kinds of Ministers: all-Union Ministers and Union Republican Ministers. The all-Union Ministers direct the branches of administration entrusted to them throughout the territory of the U.S.S.R., either directly or through authorities appointed by them. On the other hand, the Union Republican Ministers directly administer only a definite and limited number of enterprises, the remaining being administered through the Ministers of the Union Republics. It would, therefore, be clear that there are two distinct types of administration. In the first place, there are subjects like foreign trade, railways, posts and telegraphs, and telephones which are directly administered by the Union authorities throughout the territories of the Union. Secondly, there are subjects like public health and agriculture which are administered by the Union authorities through the authorities of the constituent Republics.

The Method of Separation. According to this method, legislative competence in regard to particular subjects is vested in the Central Government, but executive power in respect of such matters belongs exclusively to the organs of the constituent States; in other words, the executive authority of the federal government is *not* co-extensive with its legislative authority. This exceptional procedure was to be found in the Austrian Constitution of 1934. Thus, Article 36 of the Constitution specifically stated that the Federation shall

¹ See Yanelf, *op. cit.*, p. 47.

be competent to prescribe the general principles of law in respect of the matters specified in the Article, but the States shall have the power to decide the details of the execution and enforcement of the laws and regulations enacted by the Federation. It should be noticed that in all these cases the administration of the State Governments was independent and not subject to the control and supervision of the Federation. These matters included such items as poor relief, institutions for convalescence and medical assistance, regulation of the right to labour and protection of labour engaged in agriculture and exploitation of forests, and land reform in respect of agricultural and forest economy. Similarly, under Article 37 (2), general legislation in respect of matters specified therein fell within the competence of the Federation, whereas the enforcement and application of the laws pertained to the States. These included schools and educational institutions not falling within the exclusive competence of the Federation, or within that of the States, supervision of such schools and institutions, conditions of service of the teaching personnel of primary and complementary schools as well as of other schools belonging to the States and local authorities. The only restriction which was imposed on the authority of the States under these Articles was that the details of the execution of the laws in question prescribed by the States had to conform to the general principles of the laws established by the Federation.

This position has, however, been modified by the Constitutional Law of the 1st May, 1945, which has revived the Federal Constitution of the 1st October, 1920. This Constitution distinguishes between four different categories of subjects. The first category comprises those matters in respect of which both legislative and executive powers vest in the Federation. The second category includes those subjects which fall within the legislative and executive competence of the States. Thirdly, there are subjects in respect of which legislative authority belongs to the Federation and executive authority vests in the States. Fourthly, the Constitution also enumerates matters in respect of which the Federal Legislature has power to lay down the general principles of legislation, whereas supplementary legislation and execution belong to the States. For instance, Article 11 provides that executive power in respect of specified matters shall appertain to the States, although they fall within the legislative sphere of the Federation. The execution of laws relating to these subjects is entirely carried out by the authorities of the States which

are not subordinate to the Federal Government. However, the authority of the States in this matter, although "autonomous" according to the Constitution, is not completely independent in actual practice; and the Federal Administration is generally accorded the right of inspection and supervision.

Distribution of Executive Power under the Indian Constitution. The provisions of the Indian Constitution relating to the distribution and exercise of executive power prescribe five distinct and separate rules. The first rule is that the executive power of the Union is co-extensive with its legislative authority. This is the general rule obtaining under the Constitution of the United States, but whereas under the American Constitution there is no express provision regarding this matter, and the rule is deduced from the power granted to the President to execute federal laws, the Indian Constitution contains a specific provision. Article 73 expressly states that "the executive power of the Union shall extend (a) to the matters with respect to which Parliament has power to make laws and (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement." The first clause of the Article merely states the rule of co-extensive powers we have discussed above. The second clause has been interpreted to mean "implementation of treaties and agreements". This interpretation, however, is not correct, for the clause does not refer to any obligations arising under treaties or similar agreements. It only speaks of rights. An illustration of such rights is to be found in the Treaty of 1950 between the Republic of India and the Protectorate of Sikkim.

The second rule is a corollary of the first. Article 162 of the Constitution provides that the executive power of the States shall extend to the matters with respect to which the Legislatures of the States have power to make laws. There is an apparent contradiction between these two rules because the Union Parliament as well as the legislatures of the States have power to make laws with respect to any matter included in the Concurrent List. This apparent contradiction has, however, been solved by the provision that the executive power of the Union shall not extend in any State to matters with respect to which the Legislature of the State has also power to make laws. The net result of the rule is that whereas the Union Parliament has power to legislate in respect of any matter included in the Concurrent List, the executive power in respect of such matter continues to be vested

in the States unless the Union Parliament otherwise provides. This corresponds to the rule of law obtaining in the Commonwealth of Australia, although there is no specific provision regarding this matter in the Australian Constitution. The position appears to have been the same under the Weimar Constitution of Germany. Article 14 of the Constitution provided that the laws of the Reich are carried into execution by the authorities of the States, unless these laws otherwise decree. This, however, did not refer to the exclusive legislative power of the Reich, as the executive power in respect of the exclusively federal matters was specifically vested in the Reich. The Indian Constitution also contains another limitation on the executive power of the Union Government. Under Article 73 (2), until otherwise provided by the Union Parliament, a State and any authority of a State may continue to exercise in matters with respect to which Parliament has power to make laws for the State, such executive power or functions as the State or authority could exercise immediately before the commencement of the Constitution.

The third rule is that the Union Government is competent to delegate the exercise of its executive power to a constituent State. This may be effected in two different ways. Firstly, under Article 258 (1), the President may, with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends. This provision is applicable not only to matters within the exclusive legislative competence of the Union, but also to cases of concurrent powers where, by virtue of a Union law, executive power has become vested in the Union. An analogous provision of this character was to be found in the Austrian Constitution of 1934 which specifically authorized the Federal Government to entrust what was called "indirect federal administration" to the Governor of a State or to officers subordinate to him. Article 6 of the Constitution of Brazil is to the same effect. Secondly, the exercise of the executive power of the Union Government may also be delegated by the Union Parliament to a constituent State. Article 258 (2), which provides for this type of delegation, reads as follows: "A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the Legislature of the State has no power to make laws, confer powers and impose duties, or authorize the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof."

It is obvious that a law of this character may directly delegate the exercise of executive authority to a State or authorize the Union Government to effect such delegation whenever the occasion arises. This provision relates to the exclusive legislative powers of the Union, as the wording makes it abundantly clear; but it may also be applicable to cases of concurrent powers.

The fourth rule is that the executive power of the Union Government extends to the giving of directions to the Governments of the States. The Constitution expressly provides for two cases where the issue of directions is permissible. In the first place, such directions may be given in order to secure compliance with the Union laws by the Governments of the States. Article 256 of the Constitution imposes an obligation on the State authorities to see that the executive power of the State is so exercised as to ensure compliance with the laws made by the Union Parliament and any existing laws which apply in that State; and the Union Government is authorized to give such directions as may appear to be necessary for this purpose.¹ Secondly, Clause (1) of Article 257 authorizes the Union Government to issue directions to a State in the event of the executive power of the State being so exercised as to impede or prejudice the exercise of the executive power of the Union. It should be noticed that these provisions do not apply to cases where the exercise of the executive power of the Union Government has been delegated to the authorities of the State, for in such cases the State authorities act as agents of the Union Government and are, therefore, subject to their control and supervision.

The question may here be raised as to what is the exact significance of Clause (1) of Article 257. Does it embody the rule of immunity of instrumentalities established in the United States by judicial interpretation? The underlying principle of the American rule is that it is of the essence of a federal constitution that the Central and State Government are each entitled within the ambit of their authority to exercise their legislative and executive powers in absolute freedom, and without any interference. It follows, therefore, that, as was laid down by Marshall, C. J. in the leading case of *McCulloch*

¹ The marginal note of this Article reads as follows: "Obligation of States and the Union." This appears to be a mistake as the Article in question does not impose any obligation on the Union. The mistake has probably arisen as a result of the fact that this Article partially reproduces Section 122 of the Government of India Act, 1935, which did provide that in the exercise of the executive authority of the Federation "regard shall be had" to the interests of the Provinces or States.

v. Maryland, 4 Wheat. 316, "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the power vested in the general government." Conversely, the rule means that there is a reciprocal prohibition on interference by the Federal Government with the exercise by the States of the powers assigned to them by the Constitution. It will also be noticed that the rule covers the exercise not only of legislative and executive powers but also of taxing powers. The effect of Clause (1) of Article 257 of the Indian Constitution is, however, considerably limited. It is only applicable to the exercise of executive power and does not extend to cases of legislative or taxing powers. Moreover, unlike the corresponding provision of the Government of India Act, 1935, it does not impose any reciprocal obligation on the authorities of the Union.

Two further observations may be made in this connection. In the first place, it is the Union which decides as to whether in a particular case the executive power of a State is being so exercised as to impede or prejudice the exercise of its executive power. Therefore, if the Union considers that the authorities of a State have failed to observe the obligation imposed by this Article, it may require the State Government to amend or alter the rules and regulations under which the executive power of the State was being exercised in order to conform to this provision of the Constitution. Further, in the event of a dispute between the Union and State Governments on any justiciable issue arising under this Article, the matter would undoubtedly fall within the competence of the Supreme Court. As regards the non-observance of Union laws, cases may arise in respect of many matters included in the Union List. For instance, the Union Parliament has exclusive and complete legislative authority in respect of the highways within the territories of the constituent States declared by or under a law made by the Union Parliament to be national highways; and, in the exercise of this legislative power, the Union Parliament may enact laws which may ultimately affect the control of traffic on such highways. The control of traffic being within the executive power of the States, the authorities in charge may fail to comply with the provisions of the Union law. In such a case, the Union Government will, under the Constitution, be competent to issue directions to the State concerned.

The Constitution also provides for the issue of directions in two

other cases. In the first place, the Union Government may direct the authorities of a State to control and maintain means of communication within its territories declared in the direction to be of national or military importance. Secondly, the executive power of the Union also extends to the giving of directions to a State as to the measures to be taken for the protection of the railways within the State. In both these cases, the State authorities are entitled to be re-imbursed by the Union Government in respect of the extra cost so incurred by them. These last two provisions are of an exceptional character and appear to have been made *ex magna cautela*, for the Union Parliament has complete legislative authority in respect of communications of national and military importance as well as in respect of railways, and could, therefore, impose on the State authorities, by virtue of a Union law, the necessary obligations. Here, however, the authority has been conferred on the Union Government, and the sanction of the Union Parliament has been dispensed with.

The Rule-Making Power of the Executive. This is a problem of considerable practical importance, and has given rise to a great deal of controversy amongst constitutional jurists, particularly in the United States of America. In order to appreciate the various solutions of the problem to be found in different constitutions, it is necessary to distinguish between two kinds of executive regulations: administrative regulations or what is known as *Verwaltungsverordnungen* in German constitutional law, i.e. regulations which deal with the relations between the State and its organs and agents; and regulations of a general character, designated as *Rechtsverordnungen* by German jurists, i.e. regulations which govern the relations between individuals *inter se* and between them and the State. The first category deals with the internal organization of the executive departments of the State, and it is, therefore, generally concluded that the executive authorities have an inherent power to issue such regulations. This is the rule of the constitutional laws of France, Germany and Italy.¹ The same rule also obtains in the United Kingdom. In the United States of America, on the other hand, some of the publicists contend that there is no such inherent power of the executive. As Willoughby points out, originally the President of the United States was considered to be the political head of the government and not the highest administrative authority having power to superintend and control

¹ See Santi Romano, *op. cit.*, pp. 283-89.

the acts of federal administrative agents. This original conception has, however, undergone a considerable change and the President has now become the head of the federal administration. The Congress has, therefore, been obliged to confer on him large powers relating to a number of federal services; and this has naturally led to the promulgation of a large body of executive rules and orders.¹ However, the rules and orders promulgated by the President or by the authorities subordinate to him relating to the conduct of public business or other administrative matters do not have the same effect as federal laws, although they are binding for the purposes of the internal control and government of the State Departments.² On the other hand, the Indian Constitution has made the position clear beyond doubt by expressly conferring on the President of the Republic the power to "make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business." There is a similar grant of power to the Governors of the States. The first category of executive regulations does not, therefore, raise any difficulty.

The position is, however, entirely different with regard to executive regulations which are generally applicable to individual citizens and have, therefore, the force and effect of law. The Constitution of the United States of America expressly provides that the executive power of the Federation vests in the President of the United States. It also imposes the obligation on the President to take care that the laws of the Federation are faithfully executed. It is, however, generally held that these provisions do not confer on the President the power to make general rules and regulations even for the purpose of implementing the execution of federal laws. (*United States v. Western Union Telegraph Co.* 272 F. 311) Willoughby contends that the duty of the President to take care that the laws of the United States are faithfully executed is an obligation which does not by itself confer any right on him; it is an obligation which he must fulfil by the exercise of those powers which the Constitution and the Congress have deemed it necessary to entrust to him.³ Similarly, under the laws of the United Kingdom, the executive has no inherent power to issue regulations of a general character binding on individual citizens. According to the common law, the power to execute laws does not imply

¹ *Constitutional Law of the United States*, Vol. II., p. 1156.

² See Black, *op. cit.*, p. 141.

³ See also Hart, *The Ordinance-Making Powers of the President of the United States*, John Hopkins, *Studies in Historical and Political Science*, p. 339.

any power to make rules and regulations for implementing the laws, unless the laws themselves have expressly conferred such power. The power of subsidiary and subordinate legislation can, therefore, be exercised by the executive authorities only by virtue of delegation under the Statutes of Parliament, either in the form of Orders in Council or as Statutory Rules and Orders; but this subsidiary legislation must conform to the enactments under which it is exercised.¹ The same rule prevails under the Swiss Constitution which does not confer on the Federal Council the power to make regulations, and the custom has now been established to delegate the necessary power to the Federal Council, and all federal laws contain the general formula: "The Federal Council shall fix the date of the entry into force of the present law and shall issue the necessary regulations for its execution."²

The weight of authority on the continent of Europe as well as in some of the Latin American States is, on the other hand, in favour of the view that the rule-making power is an inherent attribute of the executive. Thus, the French Conseil d'État has laid down in an important decision that "under Article 3 of the Constitutional Law of the 20th February, 1875, the President of the Republic supervises and ensures the execution of laws, and it is to him, therefore, belongs the right to issue at all times indispensable regulations which the execution requires, according to the necessities resulting from the circumstances and in conformity with the object which the legislature has proposed." This view of the matter has been accepted by judicial tribunals and almost all eminent publicists in France, although there is a tendency to extend the scope of the authority of the President to matters not covered by laws.³ The same view prevails in Germany and Italy. According to Orlando, "the executive power has its own will, which finds legal expression in the right to issue regulations and decrees, or in a more general phrase, the right to issue ordinances. The ordinance is, therefore, the expression of the will of the executive power as law is the expression of the will of the legislative power." He further emphasizes the point that the power arises from the very nature of executive authority to which belong the application of laws, and, therefore, the selection of the means for securing

¹ See Keeton, *The Passing of Parliament*, Chap. 13.

² Batteli, *L'Équilibre entre le pouvoir législatif et le pouvoir exécutif en Suisse*, *Revue de Droit Public*, 1938, pp. 605-17. The contrary view held by some of the Swiss jurists such as Schollenberger does not appear to be correct.

³ Esmein, *op. cit.*, Vol. II, p. 80.

this object.¹ In Argentina and Brazil the Constitution expressly confers on the President of the Republic the power to issue decrees and regulations for the execution of federal laws. Thus, Article 86 of the Argentine Constitution lays down that the President of the Republic has the power to issue "the instructions and rulings that may be necessary for the execution of the laws of the Nation taking care not to alter the spirit thereof". Judicial decisions have made it clear that this power only extends to the making of rules and regulations for the execution of federal laws and must, therefore, conform strictly to the provisions of such laws. (Fallos 115, p. 189) In Brazil, however, it has been argued by De Castro, a leading constitutional jurist, that the rule-making power of the President is not limited to the execution of laws. De Castro accepts the views of the constitutionalists of France and Italy and contends that the head of the executive in Brazil has inherent power to issue rules and regulations of a general character.² In Soviet Russia the matter is covered by express provisions of the Constitution. Article 49 authorizes the Praesidium of the Supreme Soviet not only to interpret the laws of the Union but also to issue decrees. Similarly, under Article 66, the Council of Ministers has the power to issue "decisions and orders on the basis and in pursuance of the laws in operation".

It is, however, obvious that under the Indian Constitution there cannot be any presumption in favour of an inherent power of the executive to make rules and regulations applicable to individual citizens. The general principle of the Indian Constitution is that legislative power resides in the Union Parliament or in the Legislatures of the States and not in the executive authorities of the Union or of the constituent units. Therefore, under the Indian Constitution, the power to execute laws, which is a necessary incident of executive power, does not imply the power to make rules and regulations for implementing laws, unless the laws themselves have expressly conferred such power. This view of the matter is further supported by the fact that the principles of the common law form an integral part of the juridical order of the Republic, and these principles are, as we have already seen, directly opposed to the theory of inherent rule-making power of the executive. Therefore, the fifth rule of

¹ *Op. cit.*, p. 224. See also Santi Romano, *op. cit.*, p. 283.

² *Estudos de direito publico*, p. 410 et seq. This, of course, referred to the earlier constitution and not to the existing constitution of 1946, but the actual provision in both the constitutions is the same.

distribution of executive power under the Indian Constitution is that the grant of executive power does not *ipso facto* confer the power to make rules and regulations generally binding on the community as a whole.

Express Powers of the President of the Union. We have already dealt with the legislative content of executive power; it now remains to examine what has been called "governmental element" of executive power, i.e. executive powers properly so called. Almost all federal constitutions contain specific grants of such powers, as, for instance, the Constitutions of the United States of America and Argentina. Under the Indian Constitution, on the other hand, some of these powers have been expressly conferred on the President of the Union and the Governors of the States; others are to be deduced from the general scheme of distribution of *la puissance étatique*. The express powers of the President of the Indian Union are the following. The first is the power to appoint executive officers and functionaries. Under Article 75, it is the President who appoints the Prime Minister and, on the recommendation of the Prime Minister, other Ministers. Further, the Constitution expressly provides that the executive power of the Union is vested in the President, and is to be exercised by him, either directly or through officers subordinate to him. The President has, therefore, the power to appoint subordinate officers for the exercise of the executive power vested in him. He has also been authorized by the Constitution to appoint Governors of the States, Judges of the Supreme Court and of the High Courts of the States as well as members of the Election Commission and the Union Public Service Commission. These powers are analogous to those of the President of the Argentine Republic. In the United States of America, on the other hand, the appointing power of the President can only be exercised with the consent of the Senate except in cases where the Congress has made him the sole appointing authority. Secondly, the supreme command of the Defence Forces of the Union is vested in the President and is exercised by him in accordance with the laws enacted for the purpose. This provision does not, however, transfer to the President any functions conferred by any existing law on the Government of a State or other authority; nor does it prevent the Union Parliament from conferring functions on authorities other than the President. Under the American Constitution, the President is the "Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States,

when called into actual service of the United States". Similar provisions exist in the Constitutions of Brazil and Argentina. In all these cases, the Federal Congress cannot by rules and regulations impair the authority of the President to act as Commander-in-Chief, whereas the Indian Parliament can by law reduce the authority of the President to the minimum, leaving only the formal vestige of power in his hands. Thirdly, under the Indian Constitution, the President has the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence in all cases where the punishment is by a court martial, or in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends, or in all cases where the sentence is a sentence of death. This provision does not, however, affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a court martial. Nor does it affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force. The pardoning power is considered to be an essential attribute of the Head of State and finds expression in almost all constitutions. For instance, Article 86 of the Argentine Constitution reads as follows: "He may grant pardons or commute penalties of crimes subject to federal jurisdiction, after obtaining a report from the Tribunal in question except in cases of impeachment by the Chamber of Deputies." In the United States the power is restricted to the grant of reprieves and pardons for offences against the United States except in cases of impeachment. It should be observed that in all these cases the power of the Head of State cannot be affected or prejudiced in any manner by a law of the federal legislature. In Switzerland, on the other hand, the pardoning power belongs to the Federal Assembly and not to the Federal Executive. Under the Constitution of Soviet Russia, the power is exercised by the Praesidium of the Supreme Soviet which is a collegiate Head of State and has also judicial and legislative powers.

Implied Powers of the President. We have already seen that the Indian Constitution expressly provides that the executive power of the Union extends to all matters included in the Union List. It is obvious that this wording has a much wider connotation than the words "the power to execute laws" used in other federal constitutions. Therefore, there are several elements of executive power which

vest in the Union as a logical and natural consequence of the general scheme of distribution of powers. This must be distinguished from the pattern of many federal constitutions which contains a double grant of power in favour of the central legislature. In the first place, there is a list of specific powers which the federal legislature is authorized to exercise. The powers so conferred are not, however, entirely legislative. Thus, for instance, Section 8 of Article 1 of the Constitution of the United States empowers the Congress, *inter alia*, "to borrow money on the credit of the United States", "to coin money", "to establish post offices and post-roads", and "to declare war". It will be noticed that all these are in essence executive powers except to the extent that their exercise may also involve legislation. Similarly, Article 67 of the Argentine Constitution confers on the National Congress such executive powers as establishment of a national bank, contracting of "loans on the Nation's credit", approval or rejection of treaties concluded with other nations, and authorization of the executive power to declare war or make peace. Article 85 of the Swiss Constitution also contains grant of executive powers to the Federal Assembly which include intervention in Cantons, amnesties and pardons, and control of the Federal Army. Secondly, each of these constitutions confers on the federal legislature a general power of legislation. Thus, Clause 28 of Article 68 of the Argentine Constitution authorizes the Congress "to make all laws and regulations which may be advisable for exercising the foregoing powers and all other powers granted by this Constitution to the Government of the Argentine Republic." There is an exactly similar provision in the American Constitution. Similarly, Article 85 of the Swiss Constitution provides that "laws and decrees dealing with matters which the Constitution assigns to the Federal authorities" fall within the competence of the Federal Assembly.

This dual grant of power is not, however, to be found in the Indian Constitution. Like the Commonwealth of Australia Act, 1900, and the British North America Act, 1867, the Indian Constitution merely provides that the Union Parliament shall have "power to make laws" with respect to the matters specified in the Union and Concurrent Lists; in other words, the Constitution does not confer on the Union Parliament any power other than a purely legislative power. To this power of legislation must also be added the power to control the acts and policies of the Union Executive which flows from the rule that the Union Cabinet is collectively responsible to the

House of the People. It would, therefore, be obvious that subject to this grant of power, all powers of governance other than judicial are covered by the term "executive power", and vest in the President of the Union. The question of the extent of the authority of the President particularly arises in connection with the domain of external affairs. We have already seen that the Union List specifies this item as follows: "Foreign affairs; all matters which bring the Union into relation with any foreign country; diplomatic, consular and trade representation; United Nations Organization; participation in international conferences, associations and other bodies and implementing of decisions made thereat; entering into treaties, agreements and conventions with foreign countries; war and peace." As the Union Parliament has only the power to make laws in respect of these matters, the entire executive power in relation to them is vested in the President of the Republic; and it follows as a necessary consequence that the President is entitled to exercise the following powers: (i) appointment and removal of diplomatic and consular representatives; (ii) reception of representatives of foreign States; (iii) negotiation and conclusion of treaties and conventions; and (iv) declaration of war and conclusion of peace. Two other reasons may be adduced in support of the contention that these matters fall within the ambit of executive power. In the first place, as Santi Romano rightly points out, "it is a function essentially executive by means of which the State enters into and maintains relations with the other subjects of the international community, also when by the exercise of this function, the State agrees to constitute, for example, by stipulating a treaty, the juridical order of that community: the relative acts, from the point of view of international law, might give rise to rules, but, since these acts as such are not also the sources of the law of the State, their character because of this is not legislative but executive in the sense that the preparation and deliberation of these acts are included in the political function of the executive authority." (Op. cit., p. 298) Secondly, the general principle accepted by both monarchical and republican constitutions is that the competence to represent the State in international affairs belongs to the Head of State. It is true that the Indian Constitution, unlike other constitutions, does not expressly provide that the President of the Indian Republic is the Head of State, but this follows *ipso facto* from the position which the President occupies under the Constitution. In other words, it is the President of the Indian Republic who possesses

jus repræsentationis omnimodæ. It would, therefore, be clear that the President of the Republic has the right to appoint and remove diplomatic and consular representatives as well as to receive the representation of foreign States by virtue of the fact that he is the Head of State.

The treaty-making power of the Head of State is, however, of a complex character, and three different systems have been adopted in modern constitutions. According to the first system, which obtains in the United Kingdom, the constitutional organ in which the treaty-making power resides is the Crown. "It is the Crown which in virtue of the royal prerogatives issues Full Powers for the negotiation and signature of treaties and ultimately ratifies them when that is necessary."¹ In other words, in the United Kingdom it is not necessary for the executive government to secure the authorization of Parliament for the ratification of treaties, but its intervention is required when the execution of a treaty involves legislation, as, for example, in the case of additional expenditure or cession of territory forming part of the dominion of the Crown. The second system requires the collaboration of the executive and the legislature for the conclusion of an international convention or treaty. Thus, under Article 2 of the Constitution of the United States, the President of the American Federation has been authorized to make treaties but only "by and with the advice and consent of the Senate", provided two-thirds of the Senators present concur. In actual practice this limitation on the authority of the executive has often amounted to a virtual paralysis of American foreign policy, and recourse has been had to the power of the President to conclude international executive agreements. A similar rule obtains under the Constitution of Argentina. Clause (14) of Article 86 provides that the President of the Argentine Republic has the power to conclude and sign treaties, concordats and agreements required for the maintenance of good relations with foreign powers. But under Article 68 the Federal Congress has been authorized to approve or reject treaties and concordats concluded by the President. Under the third system, the entire power of making treaties has been vested in the legislature. Thus, under Article 85 of the Swiss Constitution alliances and treaties with foreign States as well as confirmation of treaties made by the Cantons between themselves or with foreign States fall within the competence of the Federal

¹ McNair, *The Law of Treaties*, Chap. II.

Assembly. The position is the same under the Constitution of the Republic of Austria. As the Indian Constitution does not confer on the Union Parliament any power other than the power to make laws in respect of entering into and implementing of treaties and international agreements, it is clear that the first system obtains in the Indian Republic. This means that the President of the Indian Republic has the power to conclude treaties and conventions with foreign States without the intervention of the Union Parliament except in cases where the execution of a treaty necessitates legislation of any kind. This is analogous to the rule of constitutional law prevailing in the United Kingdom as well as in France and Italy. For instance, under the French Constitution of 1946, "treaties relating to international organization, peace treaties, commercial treaties and treaties which commit the finances of the State, those which concern the personal status and property rights of French citizens abroad, those which affect internal French laws, and those which carry with them the cession, exchange or acquisition of territory are final only after having been ratified by a law." The treaty-making power of the President of the Indian Republic is, however, subject to two limitations. In the first place, the Union Parliament may regulate the exercise of this power by virtue of its authority to make laws in respect of the entering into and implementing of treaties. Secondly, as the Union Executive is responsible to the House of the People, the power of the President to conclude treaties is subject to its criticism and control.

As regards declaration of war or conclusion of peace, the same general principles would apply. According to the scheme of distribution of power under the Constitution, the executive power of the Union Government certainly includes the power to declare war or to conclude peace, since the power of the Union Parliament is limited to the power to make laws with respect to war and peace. It should be observed that the position is different in other constitutions. For instance, under the Constitution of the United States of America, the power to declare war vests in the Federal Congress. Similarly, the Argentine Constitution provides that the Argentine President can declare war "with the authorization and approval of Congress." In Soviet Russia the power belongs to the Supreme Soviet, but may be exercised by the Praesidium when the Supreme Soviet is not in session. According to the Swiss Constitution, declaration of war and conclusion of peace entirely belong to the Federal Parliament. Therefore,

the position in respect of this matter under the Indian Constitution differs substantially from the provisions of other constitutions, but it should be remembered that politically no executive would take the responsibility to exercise the power to declare war or to conclude peace without the assent and approval of the Parliament.

CHAPTER VIII

EXTRAORDINARY POWERS OF THE UNION

Federal Intervention in Cases of Non-compliance with Federal Laws. It has already been indicated that the relations between the central government and the member States of a federation fall under three different categories, the most important of which have been described as the relations of "supra- and sub-ordination". Under the Indian Constitution, these relations are of an extreme character. Article 254 (1) prescribes the rule of supremacy of federal laws, as in other federal constitutions. Articles 256 and 257 provide for the supremacy of the Federal Executive. As we have already seen, under Article 256, the President of the Union has the power to issue directions to the authorities of a State in the event of non-compliance with Union laws. Similarly, under Article 257, which bears the significant marginal note "control of the Union over States", the Union Executive is competent to give directions to the authorities of the States in cases where the executive power of a State is being so exercised as to impede or prejudice the exercise of the executive power of the Union.

The question, therefore, arises: what is the effect of the failure on the part of the authorities of a State to comply with the directions issued by the Union Executive? This point is covered by Article 365 which prescribes that where a State has failed to comply with the directions given under any provisions of the Constitution, the President shall be competent to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of the Constitution. Such a contingency is deemed under Clause (1) of Article 256 to be a failure of the constitutional machinery, and the President may in such an event by proclamation (a) assume to himself all or any of the functions of the government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the

Legislature of the State; and (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of the Union Parliament. The President is also authorized to make such incidental and consequential provisions as may appear to him to be necessary or desirable for giving effect to the objects of the proclamation, including provisions for suspending, in whole or in part, the operation of any provisions of the Constitution relating to any body or authority in the State. When the proclamation declares that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, the Parliament may confer on the President the power of the Legislature of the State to make laws and authorize him to delegate the power to any other authority to be specified by him in that behalf. It is further provided that the Parliament or the President or any other authority in whom such power has been vested is competent to make laws conferring powers and imposing duties, or authorizing the conferring of powers and the imposition of duties upon the Union Government or its officers and authorities.

These extraordinary powers of the Union Government are, however, subject to two limitations. In the first place, every proclamation, which has to be laid before each House of Parliament, ceases to be operative at the expiration of two months unless it has been approved by both Houses of Parliament before the expiration of the period. A proclamation, which has been approved by both Houses of Parliament, ceases to be in force on the expiration of a period of six months from the date of the passing of the second of the resolutions approving the proclamation. The maximum period for which such proclamations can remain operative has, however, been limited to three years. It is, on the other hand, provided that any law made in exercise of the power of the Legislature of the State by Parliament or the President or any other authority invested with such power shall, to the extent that it is beyond the competence of the Legislature of a State, continue to have effect for a period of one year after the proclamation has ceased to be operative. Secondly, apart from the limitation of time, the power of the President to suspend the provisions of the Constitution relating to the States is also limited by the provision that he is not authorized to assume to himself any of the powers vested in or exercisable by the High Court of the State, or to suspend, in whole or in part, the operation of any provision of the Constitution relating to the High Court. In other words, the only provisions of

the Constitution which are excluded from the suspending power of the Head of State are those relating to the judiciary.

Analogous Law: Provisions of the Austrian Constitution. It would be obvious that, in spite of the limitations, these provisions present a formidable picture of federal intervention. They are particularly striking when compared with the scheme of distribution of powers in other federal constitutions, as, for instance, the Constitution of the Republic of Austria. The Austrian Constitution does not provide for any extra-legal remedies for the failure on the part of a State to comply with the provisions of the Constitution or of laws enacted by the Federal Parliament. On the other hand, it confers jurisdiction on the Administrative Court and the Constitutional Court to deal with disputes of this character. For instance, it expressly provides that the Federal Executive represented by a competent Federal Minister is entitled to seek the assistance of the Administrative Court against an unlawful administrative act on the part of an authority of a State, when the act in question has been performed in execution of a federal law of which the administration belongs to the State or of a federal law on general principles. Similarly, the Constitutional Court is authorized to deal with conflicts of competence between a Federal authority and the States or between the authorities of the Federation and those of the States. It will be noticed that these provisions of the Austrian Constitution are entirely consistent with the general scheme of distribution of powers under a federal constitution.

The Law of the United States. It is also clear that such extraordinary powers are not to be found in the Constitution of the United States of America. Bryce, for instance, accepts the view set forth by President Buchanan that the Federal Government in the United States has no constitutional power to coerce a recalcitrant State. Referring to Judge Hare's *American Constitutional Law*, he says: "He argued that because the Constitution did not provide for such coercion, a proposal in the Convention of 1787 to authorize it having been ultimately dropped, it was legally impossible. The best answer to this contention is that such a provision would have been superfluous, because a State cannot legally act against the Constitution. All that is needed is the power, unquestionably contained in the Constitution, to subdue and punish individuals guilty of treason against the Union." (Op. cit., Vol. I, p. 337) The remedy suggested by Bryce is not, however, available in cases of disobedience of the

Constitution or federal laws, for treason, as defined in the Constitution, refers only to levying war against the United States or adhering to the enemies, or giving them aid and comfort. This definition would not, therefore, cover cases where the authorities of a State defy the directions issued by the Federal Government. A solution of the problem is to be found in Article 8 of the United States Constitution, which authorizes the Congress "to provide for calling forth the militia to execute the laws of the Union". But in such a case, the States concerned may refuse to place the militia at the disposal of the Federal Government, as happened at the outbreak of the War of 1812 when the Governors of Massachusetts and Connecticut refused to allow their militia to leave the States in compliance with a requisition made by the President under the authority of an Act of Congress on the ground that the requisition was unconstitutional. The same power was recently used by President Eisenhower in the case of Little Rock. The ultimate remedy in such cases, however, lies in the use of federal troops under Section 4 of Article 4 of the Constitution. It is true that under Article 4, the armed forces of the Federation can only be used against domestic violence on the application of the Legislature of the State or of the Executive when the Legislature is not in session. But, in fact, the power has been used in the past, as in 1894 by President Cleveland, without a requisition from the Governor or Legislature of a State.

The Law of the Latin American Federations. In Argentina, two general principles have been established by the Supreme Court. The first is that "the authorities of the Provincial Governments cannot exercise any power in respect of matters which have been delegated to the public authorities of the Nation; nor can the exercise of power by the Provincial authorities impede or render ineffective the exercise of those powers which belong to the National authorities." (*Fiscal v. Prior Convento Santo Domingo*, Fallos 10, p. 380) Secondly, "the Federal Government cannot impede or oppose the exercise by the Provinces of those powers which have not been delegated to the Federation or which have been reserved to the Provinces." (*Banco della Provincia de Buenos Aires v. Gobierno Nacional*, Fallos 186, p. 171) Under Article 31 of the Constitution, the authorities of each Province are bound to conform to the Constitution, the national laws and the treaties with foreign States which are "the supreme law of the Nation". Any dispute arising between the Central Government and a Province in respect of the non-observance of federal laws falls within

the jurisdiction of the Supreme Court. In addition, as in the United States, the Federal Congress is competent to authorize the summoning of the militia from all the Provinces or from one of them when it is necessary to ensure the execution of federal laws. Apart from this specific provision, there is nothing in the Constitution which authorizes the Central Government to exercise coercive power against a recalcitrant State. Much less is the power which has been conferred on the Federal Government under the Constitution of Mexico. The Mexican Constitution specifically provides that the Governors of the States are bound to publish and execute federal laws. Besides, the President of the Federation has authority not only to execute the laws made by the Federal Congress but also to provide for their exact observance in the administrative sphere. Any dispute arising between the Central Government and a State falls within the jurisdiction of the Supreme Court. It would, therefore, be clear that apart from the implied power of the President to use federal forces for internal security, there is nothing in the Mexican Constitution which authorizes the intervention of the Central Government in any constituent State. The earlier Constitution of Brazil, on the other hand, had presented a totally different picture because it contained detailed provisions relating to federal intervention. Under Article 6, the Federal Government was authorized to intervene in the affairs of individual States for the purpose of "ensuring the execution of federal laws and judgements." It was further provided that the National Congress had exclusive power to decide upon intervention in the States in order to ensure respect for the constitutional principles of the Union; and it was the exclusive power of the President of the Republic to intervene when the Congress had so decided or when the Supreme Federal Court had asked for it or when the established public authorities had sought for intervention, and independently of any request in all other cases falling within the purview of the Constitution. Further, the Constitution had conferred on the Supreme Court the power to require the executive authority of the Federation to intervene in the States in order to secure the execution of federal judgements. This position has, however, been substantially modified by the Constitution of 1946 and is now in accord with the law of the other Latin American Federations. There is only one exception. The Constitution expressly provides that the Federal Government has the right to intervene with force to ensure the execution of a judicial order.

The German and Swiss Constitutions. The law of Germany under the Weimar Constitution was similar to the earlier law of Brazil. Article 48 of that Constitution provided that "in the event of a State not fulfilling the duties imposed on it by the Constitution or the laws of the Reich, the President of the Reich may make use of the armed forces to compel it to do so." This Article reproduced the doctrine of *Bundesexekution* which was generally accepted in Germany and was originally incorporated in the Constitution of the German Empire. It has been regarded by several German jurists as constituting a veritable dictatorship of the President.¹ Article 37 of the Constitution of the West German Republic has embodied the same principle: "If a State fails to fulfil its obligations to the Federation under the basic law or any other federal law, the Federal Government may, with the approval of the *Bundesrat*, take necessary measures to compel the State by way of federal compulsion (*Bundesexekution*) to fulfil its duties." The provisions of the Swiss Constitution are of a similar character. Under Article 102, the Federal Council is required to ensure "the observance of the Constitution and the laws and decrees of the Confederation", and has authority to take necessary measures to this end. It is further prescribed that the Federal Council is competent to "provide for the execution of the laws and decrees of the Confederation, of the judgements of the Federal Tribunal and of agreements and arbitration awards in disputes between Cantons." Finally, in cases of urgency, the Federal Council is empowered to call out troops and to employ them as it may think necessary, when the Federal Assembly is not in session. It is, however, required to convene the Assembly immediately if the number of troops called out exceeds two thousand, or if they remain mobilized for more than three weeks.

From the foregoing discussion it is abundantly clear that the powers which have been conferred by the Indian Constitution on the President of the Republic for the purpose of ensuring the observance of federal laws and executive direction, is much more extensive and far-reaching than the powers conferred on the central authority under any other federal constitution. No other federal constitution authorizes the Central Government to suspend the constitution of a State and to assume to itself all powers which have been conferred on the States by the Constitution. In other words, the power vested in

¹ Carl Schmitt, *Die Diktatur*, Munich and Leipzig, 1928, Appendix.

the President of the Indian Republic leads ultimately to the negation of the Constitution itself. Even in Germany under the Weimar Constitution, the "constitutional dictatorship" of the President did not entail such an extensive and significant power.

Federal Intervention in Cases of Aggression and Disturbance. Under Article 355 of the Indian Constitution, the Union Government is under the obligation to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of the Constitution. This necessarily implies the correlative right of the Union Government to intervene in the affairs of the constituent States in three specific cases. In the first place, the Union Government is competent to intervene when a State is attacked by a foreign State. Secondly, the Union Government has authority to intervene in the affairs of a State to protect it against internal disturbance, and the term "internal disturbance" obviously means riots, strikes and uprisings which disturb the public peace of the State. It should be pointed out that the right of the Union Government may arise even if there is actually no external aggression or internal disturbance provided there is an imminent danger of it, because the obligation rests on the Union Government to protect a State against any such event, and, therefore, the Union Government has the right to intervene before any such event takes place. Thirdly, the Union Government is also competent to intervene to ensure that the government of a State is carried on in accordance with the Constitution. Two important points emerge from this provision. We have already seen that the Union Government has authority, under Article 365 read with Article 356, to intervene in the affairs of a State when it fails to comply with or to give effect to any directions issued by the Union Government. Article 355 authorizes the Union Government to intervene in cases where no such directions have been issued, but where the administration of the State is being carried on in contravention of the provisions of the Constitution. Such cases may arise when as a result of the fragmentation of political parties, no stable government can be secured for the administration of the State in accordance with the Constitution. Similarly, it may also arise when there is a struggle between the various organs of State authority with the inevitable result that the government of the State cannot be carried on in consonance with the principles prescribed by the Constitution. Secondly, in the event of an intervention under this Article,

the Union Government is authorized to take action under Article 356, either *proprio motu* or on the report of the Governor of the State if the circumstances so demand, and thus suspend the operation of the provisions of the Constitution relating to the State.

Analogous Law. Similar obligations have been imposed on the Federal Government under the Constitution of the United States of America as well as under the Commonwealth of Australia Act. Under Section 4 of the American Constitution, the United States is under the obligation to guarantee to every State in the Union a republican form of government, and to protect each of them against invasion and against domestic violence, on the application of the legislature or of the executive, if the legislature cannot be convened. According to the Supreme Court, the power conferred by this section appertains to the Congress which must decide whether or not a republican form of government exists in a State and adopt such measures as it may consider necessary to restore it. Once a decision has been taken by the Congress, it cannot be challenged in a court of law. Similarly, in cases of domestic violence, it is for the Congress to determine "the measures which should be adopted to make the guarantee effective". (*Luther v. Borden*, 7 How., at p. 42) It was further held in *Texas v. White*, 7 Wall. 700, that the power to enforce the guarantee clause is primarily a legislative power and resides in the Congress. It is therefore, clear that in both cases legislative sanction is an essential prerequisite to executive action. Section 119 of the Australian Constitution Act similarly imposes an obligation on the Commonwealth Government to protect a State against invasion and domestic violence, but the power conferred by this section has been construed as a purely executive power subject to legislative sanction. (See Section 51, Defence Act, 1903)

The same provision is to be found in Article 122 of the Constitution of Mexico which reads as follows: "The authorities of the Union have the obligation to protect the States against every invasion or external violence. In each case of uprising or internal trouble they equally protect them if so required by the Legislature of the State or, if the Legislature is not in session, by the Executive." Article 6 of the Constitution of Argentina provides that "the Federal Government may intervene in the territories of the Provinces to guarantee the republican form of government, or to repel external invasion and, upon the requisition of their constituted authorities, to help to re-establish them if they have been repulsed by insurrection or by invasion from

another Province." The Supreme Court of Argentina has, in one of its earliest decisions, held that the power under this Article can only be exercised after authorization by a Federal law, but "national intervention in the Provinces in all cases authorized or prescribed by the Constitution is, as has been said, an act of a political character the confirmation of which belongs exclusively to the political authorities of the Nation." Hence, it cannot be challenged in a court of law. (*Joaquin M. Cullen v. Baldomero Llerena*, Fallos 53, p. 420) Article 16 of the Swiss Constitution contains the same principles. It authorizes the Federal Government to intervene in cases of internal disorder or of threatened danger from another Canton. The right of the Federal Government to intervene *suo motu* is, however, restricted to the case where the Cantonal Government is not in a position to summon assistance from the Federal authorities. In the case of external danger, the Cantonal authorities are required by the Constitution to invoke the assistance of the Confederation, but the right of the Federal Government to intervene *suo motu* has not been conceded. It should also be pointed out that when the Federal Government intervenes in cases of internal disorder or of threatened attack from another Canton, it has no right to dispense with the constitutional guarantees in respect of the liberty and rights of the people, the constitutional rights of the citizens, and the rights and powers conferred by the people on the authorities.

Conclusions. From the foregoing discussion it would be clear that there are two points of remarkable difference between the provisions of the Indian Constitution and those of other federal constitutions. In the first place, intervention of the Union Government in a State under Article 355 of the Indian Constitution may ultimately lead to the suspension of the provisions of the Constitution in relation to the State under Article 356. In the United States of America, on the other hand, the main purpose for which intervention is authorized by the Constitution is to support the authorities of the State and to maintain its Constitution. (*Luther v. Borden*, 7 How. 1) This is also the position in the Federal States of Latin America as well as under the Constitution of the Swiss Confederation. (See, for instance, the dissenting judgement of Vrela, J. in *Cullen v. Llerena*, Fallos 53, p. 420) Secondly, under the Indian Constitution, the Union Government has the right to intervene *proprio motu* in the event of internal disturbance. The position is exactly the reverse in the United States of America and in Argentina, Brazil and Mexico. In all these States, the Central

Government can intervene in the event of domestic violence only if required to do so either by the Legislature of the State or by the Executive, if the Legislature is not in session. In Switzerland, the right of the Federal Government to intervene directly without the request of the Canton concerned accrues only when the State is not in a position to invoke the assistance of the Federal Government or where the internal disturbance entails a danger to the Confederation itself.

Emergency Powers of the Union. Article 352 of the Constitution declares that if the President is satisfied that a grave emergency exists whereby the security of India or any part of the Indian territory is threatened, whether by war or external aggression or internal disturbance, he may, by proclamation, make a declaration to that effect. The President is further authorized to issue a Proclamation of Emergency before the actual occurrence of war or aggression or disturbance if he is satisfied that there is imminent danger of such occurrence. The authority of the President to issue a Proclamation of Emergency is, however, subject to two restrictions. In the first place, the Proclamation has to be laid before each House of Parliament. The Constitution does not, however, specify any period during which this obligation has to be fulfilled. Secondly, the Proclamation ceases to be operative at the expiration of two months unless, before the expiration of that period, it has been approved by resolutions of both Houses of Parliament.

The issue of a Proclamation of Emergency has a two-fold consequence. In the first place, it virtually amounts to a negation of the federal character of the Constitution in so far as the States affected by the Proclamation are reduced to the status of a province of a unitary State. We have already seen that the Constitution expressly empowers the Union Parliament to invade the sphere of legislative authority assigned to the States while a Proclamation of Emergency is in operation. Under Article 353, the executive power of the States is brought directly under the control and supervision of the Union in the event of an emergency. The Union Parliament is also authorized to entrench upon the executive power of the States by virtue of a law enacted for the purpose and to confer powers and duties on the Union officers and authorities. In other words, the autonomy of the constituent States is reduced to the vanishing point and they become parts of a decentralized unitary State. Further, Article 268 abridges the financial powers of the States in so far as it authorizes the President

to subject the operation of the provisions dealing with the financial powers of the States to such exceptions or modifications as he thinks fit, and the abridgement thus effected may last till the expiration of the financial year in which such Proclamation ceases to operate. It clearly emerges from the foregoing provisions that the power of the constituent States can, during a period of emergency, be completely destroyed and the federal character of the Constitution totally negatived, so far as the States affected by the Proclamation of Emergency are concerned.

Abrogation and Suspension of Fundamental Rights. Under Article 358, while a Proclamation of Emergency is in force, the Union Government may make any law or take any executive action in derogation of the rights conferred on the citizens of India under Article 19 of the Constitution. The rights which may thus be abrogated are: freedom of speech and expression; assembling peacefully and without arms; formation of associations or unions; free movement throughout the territory of India; residence and settlement in any part of the territory of India; acquisition, holding and disposal of property; and practice of any profession, or carrying on any occupation, trade or business. It should be noticed that this authority does not extend to the provisions of the Constitution relating to protection in respect of conviction for offences under Article 20, protection of life and personal liberty under Article 21 and protection against arrest and detention in certain cases under Article 22; nor does it extend to the right of freedom of religion, cultural and educational rights and the right to property. But under Article 359, the President is authorized to suspend the right to move any Court for the enforcement of these rights as well as of the rights under Article 19 for the period during which the Proclamation of Emergency is in force or for such shorter period as may be specified in the order. There is still another consequence of the issue of a Proclamation of Emergency. The President may in a particular case, in the event of an emergency, consider that the government of a State affected by the Proclamation cannot be carried on in accordance with the provisions of the Constitution and, therefore, suspend the provisions of the Constitution relating to the State and assume to himself all or any of the functions pertaining to the State under the Constitution.

The legal consequence of a Proclamation of Emergency may, therefore, be summarized as follows: (i) it may lead to the suspension of the provisions of the Constitution relating to the legislative, executive

and financial powers of the States affected by the emergency; (ii) it may lead to the suspension of fundamental rights within the State; and (iii) it may also lead to the suspension of the Constitution of the State concerned.

Analogous Law: the Law of the United States. Such wide and extensive powers of the executive are not to be found in any federal State where the system of common law prevails. It may be argued in support of these provisions of the Indian Constitution what a famous Spanish jurist, Donoso Cortes, has said on this issue: "The legislator who aspires to govern in accordance with the common law in times of disturbances and uprisings is an imbecile; he who aspires to govern without any laws in times of disturbances and uprisings is bold indeed. The common law is the ordinary law of human beings in peaceful times. The exceptional law is the common rule in exceptional circumstances." (Garcia-Pelayo, *op. cit.*, p. 149) The correct position in a democratic State has, however, been thus set forth by the Supreme Court of the United States in *Ex Parte Milligan*, 4 Wall. 2: "The Constitution of the United States is a law for rulers and people equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism; but the theory of necessity on which it is based is false, for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence." The executive authorities of the United States are, therefore, confined to two specific measures for dealing with any emergency. The first is the suspension of the writ of *habeas corpus*. The Constitution expressly provides that the writ may be suspended when the public safety requires it in cases of rebellion or invasion. The effect of the suspension of the writ makes it possible for executive officers to arrest and detain undesirable or suspected persons, without any process of law, and to deprive them of the right to an immediate recourse to a court of law and to be discharged if the cause of their arrest or detention is found to be not in accordance with the law. This measure was adopted by President Lincoln on his own responsibility, but it is now a settled rule of law that it is the Congress alone which can decide upon such a measure, and the President can exercise it only

when authorized by the Congress to do so. The position is the same under the constitutions of the component States of the American Federation. The second measure is the declaration of martial law by virtue of which the government of a region or a district is temporarily vested in military officers. The right of the executive authorities to resort to the declaration of martial law is, however, subject to the prescriptions laid down by the Supreme Court. In the case quoted above, the Supreme Court laid down three general principles regarding the declaration and enforcement of martial law. In the first place, the measure can only be adopted in the case of invasions or civil war when the ordinary courts are effectively deprived of their authority and it is impossible to administer penal justice in accordance with the law. Secondly, martial law can only be declared in the theatre of active military operations where war actually prevails, the object being to preserve the security of the army as well as of the community. Thirdly, if necessity creates the regime of martial law so does it limit its duration; if it continues when ordinary courts have been restored, it amounts to usurpation of powers. In other words, martial law is legitimate when the situation does not permit the operation of the ordinary laws; it is not legitimate when such operation is possible. In a recent decision dealing with the legality of the enforcement of martial law in the islands of Hawaii, the Supreme Court has held that it is not necessary for the declaration of martial law that there should be an effective war in the place where it is declared, but the continuation of martial law becomes illegal when the danger of war is not imminent. (*Duncan v. Kahanomoku*, 327 U.S. 304) It should also be pointed out in this connection that, apart from judicial control of acts and operations during the currency of martial law, the military are also subject to the control of the President as Commander-in-Chief for excess of power or departure from rules or regulations.

The Doctrine of *Notrecht* in Switzerland. It is clear from the foregoing that the discretionary power of the executive government of the United States is substantially limited in comparison with the powers which have been vested in the President of the Indian Union. On the other hand, in Switzerland, in spite of the radically democratic character of the Constitution, judicial and executive interpretation of the inherent powers of the Confederation has gone beyond the limits prescribed in the Indian Constitution. This enlargement of the inherent powers of the executive government of the Confederation is founded upon the doctrine of necessity (*Notrecht*) borrowed from

German jurists. According to this principle, when the existing order of things is in danger, when the very existence, security and vital interests of the State cannot be remedied in time by ordinary legal means, the Federal Assembly may, by virtue of decrees of urgency, either take itself, or authorize the Federal Council to take appropriate and indispensable measures for the conservation and security of the State, even if such measures are *contra legem* as well as *contra constitutionem*. This principle has been accepted by the Federal Tribunal and has thus led to the formation of a rule of customary constitutional law. The justification for this extraordinary view has been found in Article 2 of the Constitution which deals with the objectives of the Swiss Confederation. It has been argued that the principles embodied in the Constitution must be subject to the objectives contained in Article 2. Further, it has been pointed out that the specific provisions of the Constitution must be interpreted in the light of the general principles which have been incorporated in the Constitution itself. Thus arises the principle of necessity not only for the purpose of preserving the Constitution but also for the maintenance of the fundamental principles embodied in the Constitution.¹ This interpretation of the Swiss Constitution under the influence of German jurists has, therefore, led to the establishment of a rule of law which is not to be found in any other democratic country.

The Law of the Latin American Federations. The system of emergency powers adopted in the Indian Constitution finds its closest approach in the constitutions of some of the Latin American States, particularly in those of Argentina, Mexico and Brazil. As we have already pointed out, the similarity of historical antecedents has led to the adoption of similar constitutional provisions in India and Argentina. Alberdi, the great Argentine jurist whose project was the foundation of the Constitution of 1853, desired to establish an executive authority, republican in form but monarchical in essence, derived from the Viceregal power which had prevailed before the declaration of independence. In India, the same two features are clearly noticeable in the constitutional structure which has recently been established. In the first place, the Indian polity of today is primarily republican in character. There are also features directly derived from the Viceregal authority which was supreme in India prior to the Independence Act of 1947. Hence arises the close analogy between the extraordinary

¹ Favre, *Le droit de nécessité de l'Etat*, Lausanne, 1937, p. 27.

powers of the Indian Union and the system of *estado de sitio* incorporated in the Constitution of Argentina. Article 23 of the Constitution declares that a state of siege may be declared in a Province or territory where public order has been disturbed by internal commotion or external attack imperilling the functioning of the Constitution, and the constitutional guarantees may then be suspended. As the Supreme Court of Argentina has aptly observed, "the primordial object of the *estado de sitio* is the defence of the Constitution and of the authorities which it creates." (*In re Alem*, Fallos-54, p. 432) The power to declare such an emergency has not, however, been vested in the President of Argentina. The Constitution differentiates between two classes of cases where a state of siege can be proclaimed. In the event of external aggression, the President has been authorized to issue a proclamation of emergency with the assent of the Senate but for a limited period only. The power to declare a state of siege in the event of internal disturbances belongs to the Congress. The President may in such a case issue the proclamation if the Congress is not in session, but the Congress has authority to approve or suspend a declaration issued by the President. There is also a further limitation on the power of the President. The Constitution expressly provides that the suspension of constitutional guarantees does not empower the President to pronounce any condemnation or to inflict any penalty, his authority being limited to the arrest of suspected or undesirable persons and the transport of such persons from one part of the national territory to another if they do not desire to leave the territory. Even this power of the executive has been strictly construed by the Supreme Court. (Zavalía, *op. cit.*, Vol. I., at p. 295) The law of Brazil is of a similar character, but differs on certain important points. The power to declare a state of siege belongs to the Congress whether it be in the case of war abroad or in the event of serious internal disorder or threat thereof. The President does, however, enjoy the exclusive prerogative to decree a state of siege when the Congress is not in session, but in such a case he must immediately convoke the Congress to assemble within fifteen days for the purpose of approving or suspending the decree. Secondly, where a state of siege has been decreed in the case of internal disturbance, it cannot be operative for more than thirty days, nor can it be extended at any one time. In the third place, only some of the constitutional guarantees can be suspended in the event of internal disorder. Fourthly, the Constitution expressly provides that the parties aggrieved by the failure to

observe the constitutional prescriptions are entitled to seek judicial remedies.' The *estado de sitio* under the Constitution of Mexico follows the same general principles, but there are two important points of difference. In Mexico, it is the President of the Republic alone who declares a state of siege, but he does so in agreement with the Council of Ministers and with the approval of the Congress, and, when the Congress is not in session, with that of the Standing Commission. Secondly, under the Mexican Constitution, there is no general authority for the suspension of constitutional guarantees, but only such guarantees may be suspended as impede the executive authorities in dealing promptly and easily with the situation and such suspension must be for a limited period.

Conclusions. The foregoing discussion makes it abundantly clear that the emergency powers vested in the President of the Indian Union substantially differ from similar powers under other federal constitutions in respect of many matters of considerable importance. In the first place, as we have seen, the power to declare an emergency is vested in the President of the Indian Union, whereas such a power under other federal or unitary constitutions generally belongs to the Parliament, and where the declaration is made by the Head of State, it is subject to the approval of the Parliament. Thus, in the United States of America, the power to suspend the writ of habeas corpus belongs to the Congress and it can only be exercised by the President when expressly authorized by the Congress. The same rule obtains in France. Under the law of the 3rd April, 1878, *l'état de siège* can only be declared by a law promulgated by the Legislature, but when the Legislature is not in session, the President of the Republic has the power to make such a declaration with the concurrence of the Council of Ministers, but the Legislature must be summoned within a period of two days, and when the Legislature has been dissolved, a state of siege cannot be declared, even provisionally, by the President of the Republic except in the event of external aggression. In the federal States of Latin America, as we have already seen, the power to declare an emergency primarily belongs to the Legislature.

Secondly, the power of the Indian President to proclaim an emergency is purely a discretionary power; in other words, it is not subject to review by any judicial authority, nor is it controlled by the Union Parliament, at least for a period of two months. The authority of the

¹ Articles 206 to 214 of the Constitution of 1946.

Parliament only comes into play when the President desires that the operation of the proclamation should be extended for a further period. This is not the position in any other federal or unitary State. As we have already seen, in Argentina and Brazil, even when an *estado de sitio* is declared by the Head of State, it is necessary to secure the approval of the Federal Legislature, and, therefore, the limited authority vested in the executive is subject to what has been called *juicio político* (political judgement) of the legislature.

Thirdly, under the Indian Constitution, the Proclamation of Emergency issued by the President may lead not only to the suspension of the legislative powers vested in the States but also entails complete control of the executive power of the States by the authorities of the Union. Such a provision is not to be found in any other federal constitution. Indeed, where the federal authorities intervene in the affairs of the member States they do so to protect the established authorities of the States and to maintain their constitutions. An interesting example of this is furnished by the case of the intervention of the Swiss Confederation in the affairs of the Canton of Ticino. The Federal Council of the Swiss Confederation declared in its message of the 22nd September, 1890, that the first task of the Confederation was to suppress disorder and dissolve the rebel government and the second duty was to restore the authorities removed by the rebellion and to maintain the Cantonal constitution. (De Salis, *op. cit.*, Vol. I, p. 120).

In the fourth place, under Article 358 of the Indian Constitution, while a Proclamation of Emergency is in operation, any law may be enacted by a competent authority and any executive action taken in total or partial disregard of the fundamental rights enumerated in Article 19, and any law so made remains in force during the currency of the Proclamation. It is also provided that anything done in derogation of these rights by virtue of any law so made cannot be challenged in any court. Further, Article 359 authorizes the President to suspend the right to move any court for the enforcement of the rights mentioned in Part III of the Constitution. It has been argued by no less an authority than Sir Ivor Jennings that the meaning of these two Articles of the Constitution is not clear. A careful analysis of the provisions does, however, indicate that they are clearly distinguishable. Under the first Article, those fundamental rights which have been exclusively conferred on citizens can be abrogated either by law or by executive action. The second provision covers not only the fundamental

rights of the citizens but also those which are available to all persons, citizens and foreigners, such as protection against arrest and detention and protection of life and personal liberty. In these cases, the right to constitutional remedies is merely suspended and there is no question of their abrogation or denial. In other words, if a person is arrested and detained in contravention of Article 22, such arrest and detention continue to be illegal, but the person aggrieved cannot seek any constitutional remedy for the enforcement of his right for the period specified in the order of the President. On the other hand, a law may be enacted denying freedom of expression to citizens, and a person may be arrested for the violation of the law. Such action on the part of the authorities would be lawful and could not be challenged even when the Proclamation of Emergency ceases to be operative. It would, therefore, be clear that the powers conferred on the authorities in respect of abrogation and suspension of fundamental rights are extremely wide and extensive. This is not the case under other constitutions. As we have already seen, under the Mexican Constitution, the power to suspend constitutional guarantees refers only to such rights as it may be found necessary to suppress for the purpose of dealing with the emergency. In France, on the other hand, Section 11 of the Statute of 1849 expressly declares that notwithstanding the state of siege, the citizens continue to exercise the rights guaranteed by the Constitution except freedom from house-search, freedom of speech and freedom of assembly. In Argentina the suspension of constitutional guarantees confers on the executive authorities no power other than that of arrest and transportation from one part of the territory to another.

Finally, there is a fundamental difference between the emergency powers of the Indian President and the system of *estado de sitio*. Under the Indian Constitution, the President may suspend the constitutional provisions relating to a State if he is satisfied that the government of the State cannot be carried on in accordance with the provisions of the Constitution. In other words, in the event of an emergency, not only the legislative and executive power of the member States may be curtailed and controlled by the Union authorities, but the President may also suspend the operation of a substantial portion of the Constitution. Such a vast and extensive power is not to be found in any other constitution. Neither the President nor any other federal authority has any power under any other constitution to suspend or abrogate the rights of the member States. The only

example to the contrary was to be found in Article 48 of the Weimar Constitution which has been regarded by almost all German jurists as laying the foundation of German dictatorship. On the other hand, it has been held by the Supreme Court of Argentina in the famous case of *In re Alem*, Fallos 54, p. 432, that even during *estado de sitio* the executive authorities of the Republic had no power to suppress the public authorities of the States. In that case the petitioner, a Senator, had been arrested during a state of siege for having instigated the armed forces to rebel. The Supreme Court made the following observation: "A state of siege, far from suspending the public authorities, must serve to protect them against dangers of internal troubles or external attacks. Every measure which directly or indirectly affects the existence of these public authorities and which has been adopted by virtue of the powers conferred by a state of siege must be deemed to be contrary to the essence of the institution itself and violates the spirit of Article 23 of the Constitution." It would, therefore appear that unlike all other federal constitutions, the Constitution of India contains provisions which not only enable the Union authorities to abrogate the federal character of the Constitution itself, but also to establish a virtual dictatorship of the President of the Union.

The Ordinance-Making Power of the Executive.¹ Strictly speaking, this is not an exclusive power of the Union but also belongs to the States. The Constitution authorizes not only the President of the Union but also the Governors of the States to entrench upon the powers conferred on the Legislatures. We have already seen that executive authority does not merely mean the power to execute laws. In modern democratic States, the executive has also come to secure the virtual monopoly of legislative initiative. There is, besides, the power of the executive authorities to make rules and regulations. According to Leon Duguit, this power of the head of the executive falls under five different categories. Strictly speaking, there are, however, only three. First, there is the power to make rules for colonial territories, as, for example, the power of the British Crown to make rules for British Colonies or the power of the President of the

¹ The term has also been used in the United States of America, but there it means the power of the executive to supplement or complete a legislative measure enacted by the Congress. In other words, it refers to what continental jurists have called "the secondary and derivative power of legislation". See Hart, *The Ordinance-Making Powers of the President of the United States*, Baltimore, 1925. The Indian Constitution, on the other hand, deals with the independent and original legislative authority of the Head of the Executive.

French Republic to issue similar regulations. Secondly, the power of the Head of State to make rules and regulations, as, for instance, under express constitutional provisions. Finally, there is the power of the Head of State to make rules delegated to it by the legislature. (*Manual de droit constitutionnel*, pp. 521-23).

The provisions of the Indian Constitution, however, go beyond these limits. Under Article 123, if at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require. The power of the President to make ordinances under the Article covers the entire legislative field of the Union Parliament. There is, however, one limitation. The Constitution requires that any ordinance promulgated by the President shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the re-assembly of Parliament, unless it is approved by both Houses before the expiration of that period. Similar powers have been conferred on the Governors of the States.

Both these grants are of an extraordinary nature and do not find any precedent in any other constitution. It is true that under the doctrine of necessity, which is accepted as valid in some of the countries of continental Europe, the Head of State is deemed to have inherent power to legislate in the event of a grave crisis or emergency. But the principle of *Notrecht* does not extend to the powers which have been conferred on the head of the executive under the Indian Constitution. Thus, in Italy, for instance, the Court of Cassation of Rome has repeatedly laid down that the executive authority of the State is competent to enact laws in exceptional cases of urgency and indispensable necessity. (See, for instance, *Santagelo v. Bua*, Foro it. 1924. I. 1781) But, as Orlando points out, the necessity which justifies such action must be absolute; mere convenience does not afford any protection; nor does it justify the executive authorities to claim that expeditious legislation was more useful. (Op. cit., pp. 228-229) It has also been held that a legislation enacted by the executive authority is subject to judicial review if it constitutes a simple act of government, but not when it has the imprint of an extraordinary legislative act, in which case the court can intervene only if the conditions of necessity and urgency do not concur. Further, even in cases of urgency the validity of the legislation of the executive

authority must be negatived when it comes into conflict with the right of an individual.' This position has been stabilized by Article 77 of the Constitution of 1947 which authorizes the executive to issue decrees in extraordinary cases of necessity and urgency, but requires that such decrees must be immediately transmitted to the Legislature for their conversion into laws. If they are not so converted within a period of sixty days from the date of their issue, they become void *ab initio*. The Supreme Court has, however, held that Article 77 has not abrogated the right under the previous law of necessity. (Guarino, *op. cit.*, at p. 217) It is doubtful whether this conclusion will be endorsed by the Constitutional Court, as the proposition does not appear to be defensible on logical or legal grounds.

The position is different under the Indian Constitution. The authority of the President or the Governor of a State is under the Indian Constitution purely discretionary and not subject to judicial review. Nor is it necessary that the power vested in the President or the Governor of a State should be exercised only in cases of extreme urgency. Indeed, the power of the President to legislate has, since the commencement of the Constitution, been exercised to cover nearly every kind of legislation, particularly legislation of an economic character where there was no immediate necessity. The power of the President of the Indian Union would, therefore, appear to be larger than that permissible under the doctrine of *Notrecht*. Almost all eminent jurists in Germany, where the doctrine was first propounded, agree that the system of *Notrecht* only applies in cases of grave emergency. Laband, for instance, contends that the right of the Kaiser to legislate under the Constitution of 1871 could only be invoked after a declaration of war. The only parallel is to be found in Article 14 of the Austro-Hungarian law of 1867 which authorized the Austrian Emperor to legislate when the Reichrat was not in session. Similar provisions were to be found in the constitutions of the German principalities before the *Schlussakt* of 1871. There is, however, no modern precedent with the possible exception of the now defunct Constitution of Czechoslovakia which empowered the executive authorities to enact "provisional legislation" during the recess of the legislature. Here, again, we see evidence of the legacy of the Viceregal regime, for the historical origin of the legislative authority of the President of the Republic is to be found in the Indian Councils Act of 1861.

¹ See the cases cited in Parpagliolo, *Codice Costituzionale*, pp. 28-29.

CHAPTER IX

FINANCIAL POWERS UNDER THE INDIAN CONSTITUTION

The Problems of Federal Finance. It has already been indicated that an essential feature of federations is the distribution of sovereign powers between the central authorities and the constituent units. It follows, therefore, as a logical corollary that the financial powers of every federal State must similarly be partitioned between the central organization and the component States. Every federal State is, therefore, led to seek and establish an equilibrium in the financial relations of its diverse organs. Contribution to the expenditure of the federation and participation in its resources: in other words, division of the financial sovereignty of a federal State constitutes an intricate and complex problem. It has been asserted that financial sovereignty is not sovereignty as it appears from the constitution but as it exhibits itself in the working.¹ This is only partially true, for the division of financial sovereignty must in all essentials correspond to the distribution of legislative and executive powers as embodied in the constitution. Indeed, several eminent authors have held that the equilibrium of financial relations or *finanzausgleich*, as it is called by German jurists, must depend on the solution of the problem of division of sovereign powers. Thus, according to Jessen, "the object of the regulation established by *finanzausgleich* is to guarantee the satisfaction of the financial needs of the constitutional entities established in the State, but the financial needs are delimited by the extent of the fields of their activity." He, therefore, asserts that the establishment of *finanzausgleich* must "be conditioned by the obligations which are incumbent, in point of law or fact, on the constitutional entities."

Two factors of capital importance dominate the entire question of federal finance. In the first place, as Delpech rightly points out, the

¹ *Finer, Theory and Practice of Modern Government*, Vol. I., p. 316.

burden of public expenditure must be distributed in such a manner that, from all territorial points of view, the incidence must be equal without cases of fiscal oasis or of double taxation. Secondly, the resources of a federal State must be distributed in such a manner as to enable each of the federal units to fulfil its obligations with the means placed at its disposal and without the taxpayers having to suffer from the co-existence in the same territory of several authorities having concurrent powers but with different aims and needs. These two factors make the problem of *finanzausgleich* extremely intricate and difficult of solution.

Finer contends that although there may be a large variety of methods of distributing taxing power, these are all applications of three basic methods: (a) the States and the federation may each have their separate sources, insulated and exclusive, or concurrent; (b) the federation may levy all taxes and only assign the yield of some of them to the States; or (c) the States may levy all taxes and assign a portion of the return to the federation. (Op. cit., p.315) This statement is obviously erroneous. In the first place, it is not true of any existing federation; there is no federal constitution, either extant or defunct, in which Finer's second or third method of distributing revenues has been completely adopted. Secondly, there is a clear confusion in the statement between taxing power and the yield of taxation. The methods of partitioning taxing power are entirely distinct and separate from the question of distribution of the yield of taxation. The classical German school of jurisprudence has rightly pointed out that the financial sovereignty of a State embraces two distinct elements; *objektshoheit* or the sovereign power of taxation, and *ertragshoheit* or the right to the yield of taxation. The problem of federal finance, therefore, resolves itself into two clear and different issues: (1) how is the taxing power (*objektshoheit*) partitioned between the federation and the States? and (2) is the yield of a tax, whether imposed by the federation or the States, distributed between the States and the federation? To these must be added a third important question: does the federation grant any subsidy to the States or do the States make any contribution to the federal exchequer? Every federal constitution must be examined from these three distinct and separate points of view. Every system of federal finance must be analysed with a view to ascertaining how these three problems have been solved.

Partition of the Power of Taxation. The problem of the dis-

tribution of the taxing power of a federal State has been solved in different ways in different constitutions. Generally speaking, these solutions range from the system of rigid separation or what has been called by German jurists the *Trennungssystem*, on the one hand, to one of concurrent powers or the *Mischungssystem*, on the other. The first system prescribes a clear-cut demarcation between the two fields of taxing power. This is of two types. According to the first type, specified matters are placed within the exclusive competence of the federal government, while residuary matters lie entirely at the disposal of the constituent units. The second type contains a simple enumeration of the matters in respect of which the constituent States have exclusive power to levy taxes, while all other matters belong exclusively to the federal sphere. An interesting illustration of the first type is to be found in the Constitution of Switzerland which contains an express enumeration of matters falling within the sphere of the Confederation. These include military exemption taxes, federal customs duties, revenue from posts and telegraphs, revenue from the gunpowder monopoly, stamp duties, taxation on alcoholic beverages, and taxes on commercial and industrial professions. The Cantons, on the other hand, enjoy a separate field of taxation in view of the fact that, in accordance with the general principle laid down in Article 3 of the Constitution, residuary powers of taxation are vested in them. Another instance of the *Trennungssystem* is furnished by the Constitution of Argentina. Under Article 4 of the Constitution, the revenues of the Federal Exchequer comprise the yield of import and export duties, the receipts from the sale or lease of national properties, the revenue from posts, public loans and credit operations, and such other taxes as may be levied by the Federal Legislature. These provisions must, however, be read with Clauses (1) and (2) of Article 67 which make it quite clear that the Federal Legislature is entitled to levy direct taxes only and for a limited period. Outside this clearly defined federal sphere, the Provinces enjoy residuary powers of taxation by virtue of the provision embodied in Article 104 of the Constitution. This position has been made abundantly clear by a decision of the Supreme Court in which it has been laid down that "the imposition of taxes, the selection of taxable matters and the formalities of their collection belong to the exclusive sphere of the Provinces whose powers within their respective jurisdiction are as ample as their legislative power." (Fallos 105, p. 273).

The second type of the *Trennungssystem* is to be found in the

Constitutions of Burma and Canada. Clause (1) of Section 96 of the Burmese Constitution provides that the constituent units shall have power to levy taxes in respect of matters enumerated in the Fourth Schedule to the Constitution, while Clause (2) lays down that all other sources of revenue are assigned to the Union. The Canadian Constitution Act confers specific powers of taxation on the Provinces, and these include direct taxation within the Province for provincial purposes and the power to grant licences in respect of shops, saloons, taverns, and auctioneers, etc., for the raising of revenues for provincial, local or municipal purposes. These items constitute the entire field of provincial taxation. Subject to this grant, the Dominion Parliament has power to raise money by any mode or system of taxation. It should also be noted that the Parliament of Canada is, in addition, entitled to levy direct taxes for non-provincial purposes; and this is the only element of the second system in the financial organization under the Canadian Constitution. [*Caron v. The King*, (1924) A.C. 999].

The *Mischungssystem* or the system of concurrent powers permits the federal government as well as the government of the constituent States to levy taxes in respect of the same subject matters. A typical instance in point is to be found in the Constitution of Mexico. The financial system under the Mexican Constitution has been thus described by the Supreme Court of Mexico: "The National Constitution does not prescribe a delimitation of the federal and State competence in respect of the imposition of taxes, but follows a complex system, the fundamental premises of which are as follows: (a) concurrence of the taxing powers of the Federation and the States in regard to the majority of the sources of revenue (Article 73, Clause VII and Article 124); (b) limitations on the taxing power of the States by express and concrete reservation of specified matters for the Federation (Article 73, Clauses X and XXIX); and (c) express restrictions on the taxing power of the States (Article 117, Clauses IV, V, VI and VII and Article 118)."¹ Similar examples of the system of concurrent powers are to be found in other federal constitutions. For instance, the Constitution of the West German Republic contains financial provisions which are primarily based on the concurrence of the taxing powers. Clause (2) of Article 105 of the Constitution lays down that the Federation shall have concurrent powers in respect of

¹ *In re Construcciones Alpha*, Sem. jud., App. Vol. III, at p. 1026.

excise duties and taxes on business transactions; taxes on income, inheritance and gifts; and taxes on immovable properties and business. This is the field of taxation which is shared by the Federation with the constituent units. But apart from this sphere of concurrent powers, Clause (1) of Article 105 also recognizes the exclusive power of the Federation in the matter of customs and financial monopolies. A similar type of distribution of the taxing power is to be found in the Australian Constitution Act. Section 51 (ii) provides that the Commonwealth Parliament shall have power to make laws with respect to taxation, "but so as not to discriminate between States or parts of States". Subject to the prohibition against discrimination, the taxing power of the Federation is, therefore, unlimited and absolute. But this is not an exclusive power, for under Section 107 a constituent State enjoys every power which it had at the establishment of the Commonwealth, unless it has been expressly vested in the Federal Legislature or withdrawn from the Legislature of the State. In other words, the entire field of taxation is shared between the Commonwealth and the constituent States. The only exception to this general rule is that the levy of customs and excise duties belongs exclusively to the Federal sphere. The effect of these provisions has been thus stated by an eminent jurist: "The Federal Parliament could impose taxation in every shape and form, direct and indirect, to the monopoly of all sources of revenue and to the exclusion and eventual destruction of the States. The gradual extension of Federal taxation and its infringement on the original tax-gathering preserves of the States is shown in the exclusive Federal control over customs and excise duties and in the double land tax (Federal and State), in the double income tax (Federal and State), in the double death and succession duty (Federal and State). The Federal Parliament has also anticipated the States in imposing an Entertainment Tax."¹ This statement emphasizes the danger inherent in the *Mischungssystem* which has been primarily responsible for the weakness of the financial position of the States in Australia. The same system of concurrent powers prevails under the Constitution of the United States. Article 1 of the Constitution authorizes the Congress "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States". This power of the Federal Legislative, is not, however, exclusive and the entire field of taxation

¹ Quick, *The Legislative Powers of the Commonwealth and the States of Australia*, at p. 43.

equally falls within the legislative competence of the States. The only restrictions on the taxing power of the States is that they cannot levy any customs and excise duties or duties of tonnage. Subject to this exclusion, the taxing powers of the Federation and the States are concurrent.

Between these two forms of distribution of taxing power, there are various combinations of the *Trennungssystem* and the *Mischungssystem*. An interesting instance in point is furnished by the latest Constitution of Brazil. The method of distribution adopted in the Constitution recognizes not only the system of rigid separation but also that of concurrent powers. Article 15 lays down that it is the prerogative of the Union to levy taxes on the import of merchandise of foreign origin, the consumption of goods, the production and distribution as well as the import and export of lubricants and combustible liquids, income and profits of any nature, transference of funds abroad, and affairs relating to the economic life of the Union and acts and instruments regulated by Federal laws. The field of Federal taxation is, therefore, clearly demarcated. On the other hand, Article 19 specifies the matters which fall exclusively within the taxing power of the States. This is not, however, the complete picture. Article 21 adopts the *Mischungssystem* and lays down that "the Union and the States have power to levy taxes other than those authorized by this Constitution, but the Federal tax shall exclude the identical State tax."

Taxing Power under the Indian Constitution. The financial provisions of the Indian Constitution clearly show that the Constitution follows primarily the principle of rigid separation (*Das Trennungssystem*) in the matter of distribution of the taxing power between the Union and the member States. The two fiscal spheres are distinct from each other; whatever the Constitution allots to the States is withdrawn from the hands of the Union; on the other hand, the States are not entitled to encroach on any fiscal matter which the Constitution has not particularly assigned to them, for all matters not specifically earmarked for the States by the Constitution fall exclusively within the sphere of the Union. Thus, under the Union List, the following matters fall exclusively within the competence of the Union: taxes on income other than agricultural income; corporation tax; taxes on the capital value of the assets exclusive of agricultural land, of individuals and companies, and taxes on the capital of companies; terminal taxes on goods or passengers, carried by rail, sea or air, and

taxes on railway fares and freights; taxes other than stamp duties on transactions in stock exchanges and futures markets; taxes on the sale or purchase of newspapers and on advertisements published therein; customs duties including export duties; excise duties on tobacco and other goods manufactured or produced in India except alcoholic liquors for human consumption and opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any other excluded substance; estate duty and succession duty in respect of property other than agricultural land; returns of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts. In addition, the Union has residuary powers in the matter of taxation, for, under Entry 97 of the Union List, any tax not mentioned in the State or Concurrent List falls within the exclusive competence of the Union.

Outside the clearly demarcated sphere of the Union, the States enjoy exclusive taxing power in respect of the following items: land revenue; taxes on agricultural income; estate duty and succession duty in respect of agricultural land; taxes on lands and buildings; taxes on mineral rights subject to such limitations as may be imposed by the Union Parliament; taxes on the entry of goods into a local area for consumption, use or sale; taxes on the consumption or sale of electricity; taxes on the sale or purchase of goods other than newspapers; taxes on advertisements other than advertisements published in the newspapers; taxes on goods and passengers carried by road or inland waterways; taxes on vehicles suitable for use on roads, including tramcars; taxes on animals and boats; tolls; taxes on professions, trades, callings and employment; capitation taxes; taxes on luxuries including taxes on entertainments, betting and gambling; excise duties on alcoholic liquors for human consumption, and opium, Indian hemp and other narcotics manufactured or produced in the State (but not including medicinal and toilet preparations containing alcohol or any such substance) and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India; returns of stamp duty in respect of documents other than those specified in the Union List; and fees other than court fees in respect of any matter included in the State List.

The system embodied in the Indian Constitution is not, however, one of rigid separation, for the Constitution expressly recognizes the

concurrent powers of the Union and the States in regard to two subject matters of taxation. These are: stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty; and fees in respect of any matter included in the Concurrent List, but not including fees taken in any Court.

Express Limitations on the Taxing Power. Under the Indian Constitution, the taxing power of the Union as well as of the States is subject to specific limitations. Apart from these limitations, the power is plenary and absolute. The first limitation which the Constitution expressly sets forth is that no tax shall be levied or collected except by authority of law. This provision is applicable to any and all authorities including the Union and State Governments which exercise any taxing power under the Constitution or by virtue of a law made thereunder. The prohibition is as old as the Magna Carta, and "by the statute 1 W. & M., usually known as the Bill of Rights, it was finally settled that there could be no taxation in this country except under authority of an Act of Parliament." [per Parker, J. in *Boyles v. Bank of England*, (1913) 1 Ch. at p.84] The limitation has sometimes been expressly embodied in the constitution, as in Article 265 of the Indian Constitution. Article 84 of the Japanese Constitution similarly states that "no new taxes shall be imposed or existing ones modified except by law or under such conditions as law may prescribe." Under other constitutions the limitation has been evolved by judicial interpretation. For instance, in the United States of America, where no such constitutional provision exists, it has been held that the power of taxation is exclusively a legislative function and must, therefore, be exercised in the same manner as a legislative power. (*Green v. Frazier*, 253 U.S. 233) Section 51 (ii), read with Section 55, of the Australian Constitution Act makes it quite clear that the power of taxation can only be exercised by the legislature and in the form of a legislative enactment. This rule of the common law has also been adopted in other constitutions. Thus, the Supreme Court of Mexico has laid down that "in order that the collection of a tax may be well-founded it is necessary that there must be a law imposing it and that the fiscal authority in ordering its collection must conform to all the precepts of the law; otherwise, the order for the collection is neither well-founded nor justified." (*In re Redon J. Neston*, Sem. jud., Vol. XXXIV., p. 2035).

The second limitation on the taxing power is that neither the Union nor the States can levy any tax on the income and property of

the other. This does not, however, affect the validity of any tax to which the property of the Union was liable before the commencement of the Constitution until the Union Parliament otherwise provides by law. Nor does it prejudice the right of the Union to impose any tax in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith. The Union Parliament has, however, the authority to declare by law that any class of trade or business carried on by, or on behalf of, the Government of a State is incidental to the ordinary functions of government and to exempt such trade or business from any taxation. It will be noticed that this limitation on the taxing power of the Legislatures of the Union and the States is a partial recognition of the American doctrine of the immunity of instrumentalities. This lays down that neither the Federation nor a constituent unit can so exercise its power of taxation as to curtail the legitimate powers of the other, or to interfere with the discharge of its constitutional functions or to obstruct its legitimate operations. The reason of the rule was thus stated by the Supreme Court in *McCulloch v. Maryland*, 4 Wheat. 316: "that the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, in respect to those very measures, is declared to be supreme over that which exerts the control." The doctrine has also been adopted in other constitutions. For instance, the Supreme Court of Argentina has held that neither the Federation nor a Province can impede or prejudice the exercise of the legitimate powers of the other by virtue of its legislative or taxing powers. (*Banco de la Nacion Argentina v. Provincia de Mendoza*, Fallos 226, p. 408) Section 114 of the Commonwealth of Australia Act prescribes a narrower limitation. It provides that a State shall not impose any tax on property of any kind belonging to the Commonwealth without the consent of the Commonwealth Parliament, nor shall the Commonwealth impose any tax on property of any kind belonging to a State. It will be noticed that this reciprocal obligation is only applicable to taxation of property and not to any tax on income or revenue. Moreover, the statutory provision has been construed in a restricted sense. The question of its interpretation was raised in *Attorney-General for New*

South Wales v. Collector of Customs, 5 C.L.R. 818, where the Government of New South Wales contended that they were not liable to pay customs duties to the Commonwealth in respect of steel rails imported by them for use in the construction of State railways. It was held by the High Court of Australia that a customs duty was not a tax upon property but on the importation of property and that the word "tax" in Section 114 did not include indirect taxation such as customs duties. A similarly narrow provision is to be found in Article 125 of the Canadian Constitution Act which provides that no lands or property belonging to Canada or any Province shall be liable to taxation. Another limitation on the taxing power of the Indian Parliament is contained in Article 291 of the Constitution which prescribes that the privy purse guaranteed or assured to the Ruler of an Indian State by virtue of an agreement concluded before the commencement of the Constitution is exempt from all taxation on income.

The other express limitations on the taxing power relate exclusively to the States. Article 286 contains "four separate and independent restrictions" on the taxing power of the States. In the first place, Clause (1) of the Article lays down that no State has authority to impose, or authorize the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place outside the State. The explanation appended to this Clause states that a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State. It is obvious that this limitation is an application of the general rule that the legislature of a State cannot enact laws with extra-territorial operation. The precise effect of this provision was examined at length by the Supreme Court in *Bengal Immunity v. State of Bihar*, A.I.R. (1955) S.C. 661. In an illuminating judgement, Das, A.C.J. pointed out that the provision owed its origin to the fact that under a similar provision of the Government of India Act, 1935 the State Legislatures had resorted to the imposition of a tax on sale or purchase of goods on various grounds of territorial nexus, and "this resulted in multiple taxation which manifestly prejudiced the interests of the ultimate consumers and also hampered the free flow of inter-State trade or commerce." It was held by the majority of the Court that the Explanation embodied in Clause (1) of Article 286 was intended to shift the situs of a sale or purchase from its actual situs under the general law to a fictional situs, and that this was only applicable to the case of sale or

purchase of goods outside the State. The point has been further clarified by the decision of the Supreme Court in *Ram Narain Sons Ltd. v. Assistant Collector of Sales Tax*, A.I.R. (1955) S.C. 705, where in the course of inter-State transactions goods manufactured in Madhya Pradesh were actually delivered for the purpose of consumption in Uttar Pradesh. The Supreme Court held that the Explanation in Article 286 (1) (a) determined the State of Uttar Pradesh to be the State in which the sales took place and which alone was entitled to impose a sales tax on these transactions.

The second limitation imposed by Clause (1) (b) of Article 286 on the taxing power of the States is that the Legislature of a State cannot impose, or authorize the imposition of, tax on the sale or purchase of goods where such sale or purchase takes place in the course of the import of the goods into, or export of the goods out of, the territory of India. A similar provision is to be found in the Constitution of the United States which lays down that "no State shall, without the consent of the Congress, levy any imposts and duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." Article 117 of the Constitution of Mexico similarly imposes a ban on the States in respect of levy of any kind of tax or duty on the import and export of goods. The precise scope of this restriction under Article 286 of the Indian Constitution has been examined by the Supreme Court in several cases, and certain principles may now be regarded as well established. In the first place, it has been laid down that "a sale by export involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form part of a single transaction. Of these two integrated activities, which together constitute an export sale, whichever first occurs can well be regarded as taking place 'in the course' of the other." In other words, export-sales and import-purchases of commodities lie outside the taxing power of the States [*State of Travancore-Cochin v. Bombay Company*, A.I.R. (1952) S.C. 366]. This view was affirmed by the Supreme Court in the subsequent case of *State of Madras v. Guriviah Naidu & Co., Ltd.*, A.I.R. (1956) S.C. 158, where Das A.C.J., delivering the judgement of the Court, held that dealers who, after seeking orders for supply of untanned hides and skins to London buyers, went about purchasing untanned hides and

skins in order to implement such orders, were liable to pay sales tax on their purchases. The reason was thus stated by the learned Chief Justice: "Such purchases were, it is true, for the purpose of export but such purchases did not themselves occasion the export and consequently did not fall within the exemption of Article 286 (1) (b) of the Constitution." Secondly, the exemption does not cover "the last purchase of goods made by the exporter for the purpose of exporting them to implement orders already received from a foreign buyer or expected to be received subsequently in the course of business, and the first sale by the importer to fulfil orders pursuant to which the goods were imported or orders expected to be received after the import." [*State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory*, A.I.R. (1953) S.C. 333] Patanjali Sastri, C. J. has thus explained the reason of the rule: "What is exempted under the clause is the sale or purchase of goods taking place in the course of the import of the goods into or export of the goods out of the territory of India. It is obvious that the words 'import into' and 'export out of' in this context do not refer to the article or commodity imported or exported. . . . The word 'course' etymologically denotes movement from one point to another, and the expression 'in the course of' not only implies a period of time during which the movement is in progress but postulates also a connected relation." He, therefore, held that a sale in the course of export must be understood as meaning a sale taking place not only during the activities directed to the end of exportation of goods out of the country but also as part of or connected with such activities. Therefore, the Legislature of a State can impose a tax in cases where goods are purchased in the State for sale to dealers outside the State who in their turn export them to foreign countries, because in such a case the transaction of sale is not an integral part of export. [*Mohadeo Ram Bali Ram v. State of Bihar*, A.I.R. (1959) Pat. 30] Thirdly, sale or purchase of goods effected within the State by transfer of shipping documents while the goods are in course of transit falls outside the taxing power of the State. [*State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory*, A.I.R. (1953) S.C. 333].¹

The third limitation on the taxing power of the States is that the Legislature of a State is not competent to impose, or authorize the imposition of, a tax on the sale or purchase of any goods where such

¹ See also Appendix iv.

sale or purchase takes place in the course of inter-State trade or commerce. This limitation is, however, subject to the authority of the Union Parliament to confer such power. It is obvious that this ban on the taxing power of the States has been imposed in the interest of the freedom of internal trade, as pointed out by Das, A. C. J. in *Bengal Immunity Co. v. State of Bihar*, A.I.R. (1955) S.C. 661. In that case the appellant Company was carrying on the business of manufacturing and selling biological products and medicines as a registered dealer in the State of West Bengal. It had no agent or manager or any office in the State of Bihar. The Company, therefore, disputed their liability to pay taxes under the Bihar Sales Tax Act, 1947. The Supreme Court by a majority held that the Bihar Sales Tax fell within the prohibition of Clause (2) of Article 286 in so far as the Company was concerned as the State of Bihar could not impose sales tax "on out-of-State dealers in respect of sales or purchases that have taken place in the course of inter-State trade or commerce even though the goods have been delivered as a direct result of such sales or purchases for consumption in Bihar."

Finally, the fourth restriction, which is contained in Clause (3) of Article 286, lays down that no law made by the Legislature of a State imposing, or authorizing the imposition of, a tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent. It is evident that in this clause "the Constitution-makers' attention was rivetted on the character and quality of the goods themselves and they placed a fourth restriction on the States' power of imposing taxes on sales or purchases of goods declared to be essential for the life of the community." [per Das, A.C.J. in *Bengal Immunity Co. v. State of Bihar*, A.I.R. (1955) S.C. 661] In this connection it is necessary to refer to the following observation made by the learned Chief Justice in the above case: "These several bans may overlap in some cases but in their respective scope and operation they are separate and independent. They deal with different phases of a sale or purchase but, nevertheless, they are distinct and one has nothing to do with and is not dependent on the other or others. The States' legislative power with respect to a sale or purchase may be hit by one or more of these bans."

The Constitution prescribes two other restrictions on the taxing power of the States. In the first place, Article 287 provides that no

State can impose a tax on the consumption of electricity by the Government of India, or on the sale of electricity to the Government for its consumption or on the sale to the Government for consumption in the construction, maintenance or operation of any railways. This prohibition may, however, be amended or altered by the Union Parliament by law. Secondly, Article 288 contains a prohibition on the power of a State to impose any tax in respect of any water or electricity stored, generated, consumed, or sold by any authority established under any existing law or any law made by the Union Parliament for regulating or developing any inter-State river or river valley.

Implied Limitations on the Taxing Power. We have already seen that under Article 265 of the Indian Constitution no tax can be levied or collected except by authority of law. In other words, before a tax can be imposed it is necessary that the legislature should enact a law authorizing such imposition. Moreover, the Indian Constitution does not contain a specific grant of taxing power apart from the power to enact laws. The power to tax is, therefore, inseparably connected with legislative power, although it has been regarded as a separate attribute of sovereignty. Therefore, as there cannot be any taxation without legislation, a law authorizing the imposition of a tax necessarily stands on the same footing as any other law. The content of the two laws is no doubt different, but the principles which are generally applicable to the exercise of legislative power must also be applicable to the enactment of a taxing law. The natural and logical consequence is that a law imposing a tax must strictly comply with the constitutional provisions relating to the exercise of legislative power. Under the Indian Constitution the question has been raised with regard to the relation between the taxing power and the fundamental rights guaranteed by the Constitution. For instance, in *Ananthakrishnan v. State of Madras*, A.I.R. (1952) Mad. 395, Venkatarama Ayyar, J., in dealing with the effect of Article 13 of the Constitution, observed as follows: "It does not apply to the Constitution itself. It does not enact that the other portions of the Constitution should be void as against the provisions in Part III and it would be surprising if it did, seeing that all of them are parts of one organic whole. Article 13, therefore, cannot be read so as to render any portion of the Constitution invalid. This conclusion is also in accordance with the principle adopted in interpretation of statutes that they should be so construed as to give effect and operation to all portions thereof and that a construction which renders any portion of

them inoperative should be avoided. For these reasons I must hold that the operation of Part XII is not cut down by Part III and that the fundamental rights are within the powers of the taxation by the State." This statement has recently been accepted as "apposite and correct" by Das, C. J. in *M.S.M. Sharma v. Sri Krishna Sinha*, A.I.R. (1959) S.C. 395. It is submitted that this is an erroneous view of the matter. It is true that according to the generally accepted canons of interpretation, a constitution like any other statute must be interpreted as a whole and that all provisions must be given full effect and operation. It does not, however, follow from this rule that "the fundamental rights are within the powers of the taxation by the State." Article 265 of the Constitution lays down that the power to tax can only be exercised by virtue of legislation, and the power to enact laws is under Article 245 "subject to the provisions of this Constitution." Therefore, it necessarily follows that the power to tax must conform to the provisions of Part III of the Constitution. In other words, a law authorizing the imposition of a tax cannot transgress any of the provisions embodied in Part III of the Constitution and cannot, therefore, infringe a fundamental right guaranteed by the Constitution. There is, accordingly, no substance in the argument advanced by the learned Judge that the fundamental rights are within the powers of taxation of the State. On the contrary, it is clear that the power of taxation is subject to the fundamental rights. Secondly, it must also be pointed out that under no circumstances could it be said that the fundamental rights are within the powers of taxation. By its very nature the power to tax could not directly relate to a fundamental right. The matters which are within the taxing power of the Union and of the States have been set forth in the Legislative Lists of the Seventh Schedule. While the exercise of a fundamental right may relate to any of these taxable matters and thus be affected by the exercise of the taxing power, it could not be said that the right itself is within the taxing power of the State.

A more correct view of the relation between the fundamental rights and the power to tax is to be found in the judgement of Rajamannar, C. J. in the same case. In dealing with this point the learned Chief Justice observed as follows: "One way is to hold that a tax otherwise valid does not become invalid merely because it abridged any of the fundamental rights. This way is really not a way of reconciliation; it practically makes the fundamental rights entirely subject to the power of taxation. The other way is to hold any taxa-

tion of the exercise of the fundamental right which aims at unduly abridging or destroying such right as unconstitutional. But if the taxation is only for a legitimate revenue purpose, then, it is not invalid merely because it may adversely affect any fundamental rights." Two positive propositions emerge from this observation. The first is that if a tax unduly abridges or destroys a fundamental right, it is an unconstitutional tax and, therefore, invalid. As we have already seen, this is the proposition which inevitably flows from Article 265 read with Article 245 and must, therefore, be accepted as correct. The second proposition is, however, not entirely accurate. It is not correct to assert that a tax imposed for a legitimate revenue purpose can adversely affect any fundamental right without violating the Constitution, for if it does so it abridges the right and, therefore, falls within the purview of the first proposition. The generally accepted rule under all constitutional systems is that a taxing statute cannot infringe any fundamental right in the absence of any express grant of power to do so. Thus, for instance, the Italian Constitutional Court has laid down that the taxing power of a Region is not only subject to territorial limitation but must also respect the prescriptions embodied in the constitutional laws and the general principles of the legislation of the State. (*President of the Council of Ministers v. The Region of Sicily*, Giur. cost. 1957, at p. 633).

Three specific cases of the application of the rule may now be examined. Almost all modern constitutions recognize the principle of equality before the law, and questions have, therefore, arisen as to how far a taxing law can derogate from the rule of equality. The point was specifically raised before the Supreme Court in *Syed Mohammad v. State of Andhra*, A.I.R. (1954) S.C. 314. In that case Section 1 of the Madras General Sales Tax Act, 1939 was impugned on the ground that the Section singled out for taxing purchasers of specified commodities only, but left out purchasers of all other commodities. The Supreme Court impliedly accepted the view that the law would be void if it infringed the rule of equality embodied in Article 14 of the Constitution, but held that the guarantee of equal protection of laws did not require that the same law should be applicable to all persons. The Court also pointed out that there was no material on the record of the case that the purchasers of other commodities were similarly situated as the purchasers on whom the tax had been imposed. The question was also raised before the Supreme Court of Mexico in the case of the *Mexican Fibre Co.*, Sem. Jud., Vol. CVI.,

p. 1863, where the Court held that Article 13 of the Mexican Constitution, which guarantees equality before the law, prohibited the imposition of exorbitant and arbitrary taxation. The Constitution of Argentina contains an express provision which lays down that equality shall be the basis of taxation and public charges; and this has been construed by the Supreme Court as prohibiting "arbitrary distinctions inspired by a manifest intention of hostility against specified persons or classes." (Fallos 132, p. 402) It has, therefore, been held that where a tax entails the deprivation of a substantial portion of property or of income from invested capital, it is not a tax but a spoliation and is, therefore, contrary to the provision of the Constitution. (Fallos 137, p. 212) Similarly, under the Constitution of the United States, the rule laid down by the Supreme Court is that the guarantee of equal protection extends to taxing laws. (*Magoun v. Illinois Bank*, 170 U.S. 283).¹

Similar questions have arisen with regard to the right to property. All modern constitutions contain a guarantee that the property of an individual shall not be acquired by the State except under the authority of a law and for public purposes on payment of compensation. The issue which arises in this connection is: to what extent can the taxing power of a State invade this fundamental right? In the United States of America it has been held that a taxing statute is unconstitutional if it is so arbitrary as to make it clear that the tax was not designed to raise revenue but to confiscate property. (*Brushaber v. Union Pacific Railway Co.*, 240 U.S. 1) The Supreme Court of Argentina has gone further and held that the fact that a tax is exorbitant is sufficient to render it unconstitutional as it entails an abridgement of the right to property. Thus, in a case where the statute imposed a tax of 50 per cent on all legacies it was held by the Court that the tax amounted to "a veritable exaction or confiscation which has imposed excessive restrictions on the rights of property and the right to bequeath which Articles 17 and 20 of the Constitution have guaranteed to citizens as well as to foreigners inasmuch as it deprives a person of a substantial part of his property or of his income from invested capital over several years. The power to tax is subject to certain principles which constitute its very basis and one of these is that it must be justly

¹ In the recent case of *Allied Stores of Ohio v. Bowers*, 358 U. S. 527, the Supreme Court has held that while the States in the exercise of their taxing power are subject to the requirements of the equal protection clause, that clause imposes no iron rule of equality. To avoid violation of the clause, a State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary.

distributed; and taxes which do not conform to them are not taxes but confiscation." (Fallos 115, p. 111) It is, however, clear that this principle is not applicable under the Indian Constitution, for Clause (5) of Article 31, expressly provides that the guarantee of the right to property under Clauses (1) and (2) of the Article shall not affect any law which the State may make for the purpose of imposing or levying any tax.

The same question has arisen with regard to other fundamental rights. For instance, under the Constitution of the United States of America it has been held that the imposition of an unreasonable and disproportionate fee on periodical publications constitutes an infringement of the freedom of the Press and is, therefore, unconstitutional. The question was raised for the first time in the case of *Grosjean v. American Press Co.*, 297 U.S. 233. The impugned legislation in that case purported to impose a licence tax of 2 per cent of the gross receipts on all persons selling or making any charge for advertising or for advertisements in any journals or newspapers having a circulation of more than 20,000 copies per week. It was held by the Supreme Court that the tax in question was unconstitutional because it abridged the freedom of the Press. Sutherland, J., delivering the judgement of the Court, observed: "The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because in the light of its present setting it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees." In *Murdoch v. Pennsylvania*, 319 U.S. 105, the impugned legislation provided that all persons canvassing for or soliciting orders for goods, paintings, pictures, or merchandise of any kind shall be required to procure a licence on payment of certain fees. The Ordinance was impugned by members of Jehovah's witnesses who went about distributing literature and soliciting people to purchase certain religious books. The Supreme Court rejected the contention that when a religious sect uses ordinary commercial methods to raise propaganda funds it is proper for the State to charge reasonable fees. Douglas, J., while delivering the opinion of the Court, observed: "We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite

another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeannette is a flat licence tax, the payments of which is a condition of the exercise of these constitutional privileges." The Court, therefore, held that as the tax was laid specifically on the exercise of a fundamental right, it was unconstitutional. As we have already seen, the point was raised before the Madras High Court in *Ananthakrishnan v. State of Madras*, A.I.R. (1952) Mad. 395. In that case the Court did not accept the plea that the impugned Act was unconstitutional, but following the American decision, it laid down that any taxation on the exercise of a fundamental right which aims at unduly abridging or destroying such a right is unconstitutional. A different view was, however, taken by the same Court in *Varadachari v. State of Madras*, A.I.R. (1952) 764, where it was held that "the licence fee must be reasonable, whereas a tax need not be." It is submitted that there is no justification for this distinction. A tax may interfere with the exercise of a fundamental right as much as a licence fee, and in both cases, as pointed out by Rajamannar, C. J. in *Ananthakrishnan's case*, the test is whether the tax or licence fee is reasonable or not. A licence fee or a tax is unconstitutional if it amounts to an unreasonable restriction on a fundamental right. This is the view that has also been taken under other constitutional systems. For instance, the Federal Council of Switzerland has held that if a tax makes it impossible to carry on a trade, it amounts to a violation of Article 31 of the Federal Constitution and is, therefore, unconstitutional. (*In re Othmer Braun*, De Salis, op. cit., Vol. III., No. 787) The Supreme Court of Argentina has also adopted the same principle. Thus, it has held that a tax of the Province of Tucuman on the production of sugar was so excessive as to infringe the fundamental right of the producers of sugar in the Province and was, therefore, contrary to the provisions of the Constitution.¹ From the foregoing discussion two conclusions may be drawn. First, there is no distinction between a licence fee and a tax from the point of view of fundamental rights. Second, a tax as well as a licence fee interferes with a fundamental right but constitutes a reasonable restriction unless they abridge or destroy the right.

Distribution of Income from Taxation. The second question relates to *ertragshoheit* or the right to the yield of taxation. This is independent of the method of distribution of taxing power. In the first

¹ Fallon 98, p. 20.

place, once the subject matters of taxation have been distributed between the federation and the States, the proceeds of a tax, generally speaking, belong exclusively to the authority levying the tax. Secondly, a federal constitution may prescribe that the yield of a particular tax, whether levied by the federation or the States, shall be distributed between the States and the federation. For instance, under the Swiss Constitution a tax is imposed on all citizens liable to military duty who do not perform personal service with the army. Every able-bodied citizen is under an obligation to go into camp for a certain period with the armed forces and to be called out as occasion requires. Persons who do not pass the medical examination are required to pay an exemption tax. Every Swiss citizen residing abroad is similarly liable. The tax is collected by the Cantons but one half of the gross receipts is assigned to the Confederation. Thirdly, it may be provided in a federal constitution that, while the power to impose a particular tax is vested in the federation, the proceeds of such a tax shall be allocated to the States. For instance, under the Constitution of the United States the Federation is competent to levy capitation and other direct taxes but the yield of such taxes (except income taxes) has to be apportioned among the States on the basis of population. Conversely, the States may have the power to levy a particular tax but the receipts from the tax may under the constitution be assigned to the federation. Thus, for example, the Brazilian States were formerly competent to impose import duties on foreign goods destined for consumption within their territories but the proceeds of such duties reverted to the Federal treasury. (Vide Clause 3 of Article 9 of the Constitution of 1891).

Distribution of Income under the Indian Constitution. As we have already seen, broadly speaking, the general rule of federal constitutions is that the proceeds of a tax belong to the authority which levies it. Thus, if the Federation levies a tax in respect of a matter assigned to its competence, it retains the proceeds accruing from such a tax. On the other hand, the revenue from a tax lawfully imposed by a component State attaches to the fisc of the State. There are, however, four important exceptions to this general rule embodied in the Indian Constitution. In the first place, under Article 268, the proceeds of stamp duties and excise duties on medicinal and toilet preparations as specified in the Union List are assigned to the States, although they are levied under a law of the Union Parliament. This Article is borrowed from the Government of India Act, 1935, and

the rule was justified by the Joint Parliamentary Committee on the ground that uniformity of legislation on these matters was desirable and necessary throughout the territories of the Union. Secondly, under Article 269, the Union Government is authorized to levy and collect succession and estate duties other than in respect of agricultural land, terminal taxes on goods or passengers carried by rail, sea or air, taxes on railway fares and freights, taxes on transactions in stock exchanges and stock markets, and taxes on the sale or purchase of newspapers and on advertisements published therein, but the net proceeds in any financial year of any such duty or tax are assigned to the States and distributed among them in accordance with such principles of distribution as may be formulated by the Union Parliament by law. Here, again, the reason for assigning the taxing power to the Union is that uniformity of legislation is desirable throughout the territories of India. The second reason is that it enables the Union Parliament to levy a surcharge on any of these duties or taxes for the purposes of the Union. Thirdly, income tax other than agricultural income tax is levied and collected by the Union Government, but has to be distributed between the Union and the States. The Constitution prescribes that such percentage, as may be determined by the President in consultation with the Finance Commission, of the net proceeds of income tax in any financial year shall be assigned to the States and distributed among them in such manner and from such time as may be directed by the President in consultation with the Finance Commission. This reproduces the practice which had been in force since the Government of India Act, 1919, the justification for which is to be found in the necessity of uniformity of legislation. It also enables the Union Government to levy a surcharge for the purposes of the Union. Thus, under the Constitution (Distribution of Revenues) Order, 1953, the percentage of the net proceeds of the taxes on income assignable to the constituent States has been fixed at fifty-five per cent. Fourthly, the Constitution authorizes the Union Parliament to provide that the whole or any part of the net proceeds of the excise duties other than duties on medicinal and toilet preparations shall be distributed among the States in accordance with such principles of distribution as the Parliament may determine. This is an enabling provision which the Union Government may utilize in order to provide the constituent States with additional revenue in the event of financial crises or difficulties.

Analogous Law. Similar provisions are to be found in other

federal constitutions. For instance, under the Swiss Constitution, the Confederation has introduced a uniform regulation of the patent tax system in respect of commercial travellers. The entire proceeds from this tax are, however, assigned to the Cantons in proportion to their population. Similarly, the Constitution provides that "the net proceeds to the Confederation from the internal manufacture of alcohol and the corresponding addition to the duty on imported alcohol are divided among the Cantons in proportion to the actual population as ascertained by the federal census." The gross proceeds from the military exemption tax are also distributed in equal shares between the Confederation and the Cantons. Under Article 87 of the Commonwealth of Australia Act, 1900, the net revenue of the Commonwealth from duties of customs and excise were distributed between the Commonwealth and the individual States for a period of ten years after the establishment of the Commonwealth. This was replaced by the Surplus Revenue Act, 1910, which provided for the annual payment by the Commonwealth to the States of an amount equal to twenty-five shillings per head of their population in each year. These *per capita* payments were, however, abolished under the State Grants Bill of 1927 and were succeeded by a financial agreement concluded between the Commonwealth and the States under which the Commonwealth contributions to the State were fixed at an annual amount and the Commonwealth also agreed to make certain contributions towards the Sinking Fund in respect of the existing and future public debts of the States. In the Dominion of Canada, a peculiar arrangement has been arrived at under which nine of the ten Provinces of Canada have entered into agreements to rent certain fields of proportional taxation to the Federal Government in return for annual payments.

Financial Contributions and Grants. The third question, i.e., matricular payments or grants of subsidies, has assumed considerable importance in most of the federal States. An ever-increasing burden of social and economic obligations has led modern States to seek an elastic system of finance, and this has initiated transfers of revenue by one party to the other. When the beneficiary is the federation, it is called the "system of contributions"; when there is transfer by the federal fisc to the States, it is called the "system of subsidies". The first system was embodied in Article LXX of the German Constitution of 1871 which authorized the Reich to levy contributions from the States in proportion to their population in so far as the common

expenses could not be met by the revenues allocated to the Reich and so long as Imperial taxes had not been introduced. It is, however, nothing more than a historical souvenir since under the Weimar Constitution all traces of it were removed from the German financial system. A similar provision is to be found in Article 42 of the Swiss Constitution which states, *inter alia*, that the expenditure of the Confederation can be met "out of the contributions of the Cantons, which shall be determined by federal legislation with special reference to their wealth and taxable resources." Such matricular contributions were levied by the Confederation to meet the expenditure incurred in connection with the Baden insurrection in 1849.

The system of subsidies is, however, the more modern solution and has been adopted by most of the federal states. These federal subsidies are of two kinds, viz., general or special. In modern federal constitutions it is the first kind which has been generally adopted. This is a flexible system as it allows the States complete liberty as to the disposal of the grant. On the other hand, there is the danger of having little regard for the federation in the manner of utilizing these grants. Under the system of special subsidies the spending power of the States is restricted since the grants are subject to conditions which the States are bound to accept under pain of seeing themselves deprived of their benefit.

Financial Grants under the Indian Constitution. The Indian Constitution provides for two different kinds of federal grants: specific grants and grants of a general character. Under the first category fall the grants which the Union Government are required to make to the revenues of the States of Assam, Bihar, Orissa and West Bengal in lieu of assignment of any share of the net proceeds of export duty on jute and jute products. Such payments are required to be made so long as any export duty on jute or jute products continues to be levied by the Union Government or until the expiration of ten years from the commencement of the Constitution, whichever is earlier. The amount of these payments is determined by the President in consultation with the Finance Commission. To this category also belong the capital and recurring grants which the Union Government is required to make to a State to enable it to meet the cost of such schemes of development as may be undertaken by it with the approval of the Union Government for the purpose of promoting the welfare of the Scheduled Tribes or raising the level of administration of the Scheduled Areas. There is a further provision that grants in aid shall be paid

to the State of Assam equivalent to the average excess of expenditure over the revenues during the two years immediately preceding the commencement of the Constitution in respect of the administration of the tribal areas. The Union Government is also required to pay the cost of such schemes of development as may be undertaken by the State of Assam with the approval of the Union Government for the purpose of raising the level of administration in these areas. Over and above these special grants the Union Parliament has the authority to make payments as grants in aid of the revenues of such States as it may determine to be in need of assistance; and different sums may be fixed for different States. The powers conferred on Parliament under these provisions are exercisable by the President by order passed after consultation with the Finance Commission, and any such order has effect subject to any provision made by the Union Parliament.

As we have already seen, the system of federal grants is an integral part of the financial organization of almost every federal State. For instance, in Switzerland, the subsidies have played a far more important role than in any other federal State. As a result of these grants, the Cantons are in a position to undertake and carry out various tasks, many of which are of the utmost importance. In most cases the Confederation lays down definite conditions in connection with these payments; and, consequently, the amount of subsidy is calculated according to the sum spent by the Cantons themselves for the same purpose. The utilization of the subsidies is under the constant control of the Federation; and thus, as a matter of fact, with regard to these spheres of undertakings the Cantons find themselves in a position of dependence on the Confederation. The system of federal grants was also utilized in the United States of America during the Second World War when a large number of federal regulations were executed by the functionaries of the States under the system of financial assistance so as to allow to the federal authorities a large scope of supervision and inspection.

Unlike the Constitution of the Swiss Confederation, the Indian Constitution does not provide for contribution by the States to the federal fisc. This may be attributed to the fact that the sources of revenue assigned to the exclusive competence of the Union Government are so large and extensive that it is inconceivable that the Union Government will at any time stand in need of any contributions from the States. The only contribution which the Constitution dealt with

related to those which Part B States were required to make in consequence of a financial agreement between them and the Union Government. This provision has now become obsolete as the distinction between Part A and Part B States no longer exists.

Conclusions. The foregoing survey clearly indicates that the financial provisions of the Indian Constitution cover every aspect of federal finance and do not present a single instance of radical departure from the general rules obtaining in almost all federal States. There is, in the first instance, a clear and precise demarcation of the fiscal sphere of the Union and State Governments. There are also specific provisions for the distribution of revenue in specified cases. Finally, the Indian Constitution also provides for federal grants to assist the State in the discharge of specific obligations or for general purposes. It is, therefore, difficult to agree with the views which have been expressed by Sir Ivor Jennings. He says: "The problem (of federal finance) is complicated, and the Constituent Assembly has provided a complicated solution. . . . Experience elsewhere has shown that arrangements of this character almost always prove to be unsatisfactory after ten years or so. A system so rigid as that of India may prove to be deficient even sooner." (Op. cit., p. 72) These statements will not, however, bear scrutiny. In the first place, as pointed out above, the financial system incorporated in the Indian Constitution marks no departure from the provisions generally contained in a federal constitution. The problem of federal finance is no doubt complicated, but the solution presented by the Indian Constitution is no more complicated than, for instance, the system obtaining in the Swiss Confederation. On the contrary, the Indian system is much more precise and simple than the *finanzausgleich* established in Germany under the Weimar Constitution in consequence of the reforms introduced by Erzberger. Secondly, the financial system under the Indian Constitution is much less rigid than that of the Australian Commonwealth or of the Dominion of Canada. This is clear from the fact that apart from the grant of residuary powers, the Constitution allocates extensive and elastic sources of revenue to the Union Government, and also authorizes the Union to pay subsidies to the States wherever and whenever necessary. Thirdly, it is not correct to say that the system of federal finance incorporated in the Indian Constitution has always proved to be unsatisfactory after a period of ten years or so. Indeed, the evidence of constitutional history proves the contrary. For instance, in the

United States of America the financial arrangements were not revised for over a hundred years and this was because it was not found necessary to do so. It was only when the "apportionment clause" was found to be an unnecessary curb on the financial competence of the Federal Government that constitutional battles began for the revision of the financial arrangements, and this did not begin until the end of the nineteenth century, whereas the American Federation was established in 1789. Similarly, no change was introduced in the financial system of the Swiss Constitution of 1874 until the year 1917, i.e. more than forty years after the establishment of the Confederation. In both these cases, unlike the Union Government of India, the Central Government did not possess residuary powers of taxation, nor did their fiscal competence embrace a large number of elastic sources of revenue. The financial arrangements under the Constitutions of Argentina and Brazil have also continued to be operative without any amendment for at least half a century. The only exception to this general rule is the Commonwealth of Australia, but there, it must be remembered, special circumstances have led to financial crises. Under the Commonwealth Act, customs and excise duties, which represented the main source of revenue of the six Australian self-governing Colonies, were assigned to the Federation, leaving very little scope for the development of the financial resources of the States; and there was considerable disagreement amongst the States regarding this provision of the Constitution. It was, therefore, as a result of a compromise that Section 87 of the Constitution, otherwise known as the "Braddon blot", was added to the Constitution, but this did not give adequate relief to the States as the benefit was confined to a period of ten years after the establishment of the Commonwealth. Therefore, it is not surprising that there was a complete breakdown of the financial resources of the States after Section 87 of the Act had ceased to be operative. The case of Australia does not consequently justify the general statement that the system of federal finance, as embodied in the Indian Constitution, will prove to be unsatisfactory after a period of ten years.

CHAPTER X

JUDICIAL POWER UNDER THE INDIAN CONSTITUTION

The Problem of Interpreting Authority. One of the basic features of every modern constitution is the distribution of the sovereign power of the State among its three organs: the executive, the legislative and the judicial. It is manifest that such a system of separation creates the necessity of instituting an authority invested with power to compel the various organs of the State to remain within the limits imposed by the constitution. In States with unwritten constitutions such as the United Kingdom, the legislature is the supreme authority and cannot, therefore, acknowledge any limitation on its power; both legislative and constituent powers are exercised by it. On the other hand, the executive is subject to the control of the judiciary in so far as any executive act or regulation offends against the laws of Parliament or the common law. The same problem arises in States endowed with written constitutions of a unitary character. For instance, under the Italian Constitution of 1848, as Orlando points out, there was no distinction between legislative and constituent powers, and accordingly there were no differences between constitutional and ordinary laws. Consequently, the legislature had the power to enact laws in contravention of the written constitution. Such is still the case under the Constitution of Belgium. An eminent Belgian jurist¹ has thus explained the position: "The legislative power enacts laws, the judicial power applies them and the executive power provides for their execution. Each of them must remain within the circle marked by the fundamental pact. The courts charged with the application of laws have not been instituted for judging and reforming them, but to ensure the observance of their prescriptions. The law, whether good or bad, is always the law. In all these cases, it is clear,

¹ Thonissen, *La Constitution Belge*, 2nd. ed., p. 333.

the legislature is considered to be the supreme authority and is, therefore, in a position to exercise powers beyond the limits prescribed by the constitution, whereas the executive authority continues to be subject to judicial control.''

The problem is much more complex under a federal constitution, because, apart from the application of the doctrine of separation of powers, there is a further distribution of powers between two sets of governments; and this distribution is as binding on the federal authorities as it is on the member States. The federal government cannot ordinarily enter the domain exclusively assigned to the States; nor can the States entrench upon the exclusive competence of the federal organs. Therefore, in a federal constitution, it is imperatively necessary that there should be a duly constituted authority to enforce the observance of the constitutional limitations. Further, in a federal State the constitution is the supreme and fundamental law and any executive or legislative act, whether on the part of the federal authorities or on the part of the States, cannot be operative if it is contrary to the provisions of the constitution. This makes it all the more necessary that there should be an authority to annul such acts. Finally, with the exception of the federal constitutions of the Dominions of Canada and Australia, all federal constitutions contain a declaration of rights protecting the citizens against encroachment by the federal and State governments. This declaration constitutes an express limitation on the power of the federation as well as of the States, and, therefore, requires an independent body to enforce its due observance and fulfilment. Hence two different problems arise under a federal constitution. The first relates to the question: who is to interpret the constitution and determine whether or not an executive or legislative act is contrary to it? The second deals with the question of the authority for the settlement of disputes between the various public authorities of the federation. The existing constitutional systems offer three different kinds of solution to the first problem: (a) where the constitution has itself conferred on the highest legislative or executive authority the power to interpret the constitution; (b) where an independent body has been created for the exclusive purpose of interpreting the constitution; and (c) where the power to interpret the constitution falls within the jurisdiction of the ordinary courts of law.

Legislative and Executive Interpretation. An instance of the first solution is furnished by the Swiss Constitution. As De Salis points

out, under the Constitution of Switzerland, the supreme power appertains to the Federal Assembly and it is for the Assembly to decide whether it has by any of its acts violated the Constitution.¹ This is always a political question and the Constitution does not permit such questions being submitted to the Federal Court. Rappard,² therefore, contends that in theory as well as in practice, it is the Federal Assembly which is the legitimate interpreter of the Constitution, and justifies this rule on three specific grounds. First, the contractual element of the Swiss Constitution is appreciably weaker than that of the American Constitution. Second, he agrees with Dubs that a federal constitution has a two-fold character; it is both a treaty and a statute. This dualism, which is necessary for the justification of the distinction between the constitution and ordinary laws, is equally weak in Switzerland. Third, in consequence, judicial control of the constitutionality of a federal law has better justification in the United States than in Switzerland. The Federal Assembly has, however, conferred limited authority on the Federal Council (*Conseil Federal*) to decide disputes arising under federal laws. Thus, under Articles 124 to 132 of the Federal Law of Judicial Organization of the 6th January, 1944, the Federal Council has jurisdiction in respect of appeals against (a) decisions of federal authorities which are independent of federal administration; (b) resolutions of the Cantons in cases of violation of certain provisions of the Constitution; (c) resolution of the Cantons contrary to federal laws other than laws relating to personal or criminal law; and (d) resolutions of the Cantons against provisions of international treaties of an economic character. These rules do not, however, entirely dispense with the authority of the Federal Court in respect of the interpretation of the Constitution. Under Article 113, the Federal Court has jurisdiction in regard to complaints of violation of the constitutional rights of citizens and complaints by individuals of violation of concordats and treaties. This limited jurisdiction is, however, expressly subject to the provision that "the Federal Tribunal shall administer the laws passed by the Federal Assembly and such decrees of that Assembly as are of general application. It shall likewise act in accordance with treaties ratified by the Federal Assembly." A further limitation on the authority of the Federal Tribunal has been

¹ De Salis, *op. cit.*, Vol. I., Chap. 4.

² Rappard, *Le contrôle de la constitutionnalité des lois fédérales par le juge aux Etats Unis et en Suisse*, *Zeitschrift für Schweizerisches Recht*, p. 145a.

introduced by the Federal Law of 1893 which provides that in respect of violation of constitutional rights, the jurisdiction conferred by Article 113 of the Constitution shall be confined to complaints against the decisions of the Cantonal authorities. Therefore, the Federal Tribunal has no authority under the Constitution to question the validity of a federal law on the ground that the law contravenes the provisions of the Constitution. Further, there is a curious practice that if a federal authority is dissatisfied with the judgement of the Federal Tribunal, it may move the Federal Council to invoke the intervention of the Federal Assembly and thus secure the reversal of the decision. The cardinal features of the constitutional law and practice of Switzerland are, therefore, (a) legislative and executive interpretation of the Constitution and (b) legislative control over judicial interpretation of the Constitution within the limited sphere assigned to the Federal Tribunal. It is not surprising that as a result the executive authority of the Swiss Confederation has been enlarged under the doctrine of *Notrecht* in violation of the Constitution itself.

The climax of this system is to be found in Soviet Russia where "control over the observance of the Constitution of the U.S.S.R. and the ensuring of conformity of the constitutions of the Union Republics with the Constitution of the U.S.S.R." fall within the jurisdiction of the highest authorities of the Federation. Although there is no specific provision dealing with the question of interpretation of the Constitution, it would appear that the power to interpret it is vested in the Praesidium of the Supreme Soviet which has been granted specific authority to interpret the laws of the Federation. The same rule is to be found in the Polish Constitution of 1952 which, as Polish authorities claim, is modelled on the Constitution of Soviet Russia. Here, however, express authority has been conferred on the Council of State, which corresponds to the Praesidium of the Soviet Union, to determine the general rules of interpretation of laws; and the courts, as Mankowski points out, are bound to proceed in agreement with the directions of the party and of the politics of the Government; in other words, interpretation of the Constitution entirely depends on the views of the executive government of the State. A Polish jurist has thus explained the position: "The courts and the organization and jurisdiction of justice have for ever broken away from the idea of super-class, independent and apolitic courts. The activity of the courts has never been, nor is,

and can never be independent of the will of the dominant working class."¹

Independent Authority for Interpretation. Under the second system, the power to interpret and enforce the constitution is vested exclusively in an independent organ created by the constitution. A typical instance is furnished by the Italian Constitutional Court. As the Court itself has declared in a leading case, "Article 134 of the Constitution has established the Constitutional Court as the sole organ of constitutional jurisdiction or, more specifically, as the sole judge of the validity of State and regional laws and in respect of conflicts of power between the State and the Regions or between the Regions themselves." (*Presidente di Consiglio dei Ministri v. Regione Siciliana*, Giur. cost. 1957. 463) The Court has exclusive constitutional jurisdiction; in other words, all questions relating to the interpretation of the Constitution have to be referred to the Court for decision, whether such questions arise in the courts of first instance or on appeal. The jurisdiction of the Constitutional Court is, however, limited to the question of constitutional validity, and it cannot decide any case on its merits. Similar is the position of the Federal Court under the Austrian Constitution. Article 163 of the Constitution expressly states that "the Federal Court has been established to ensure the constitutionality of legislation and the legality of administration." There is, however, an important point of difference between the Italian Constitutional Court and the Federal Court of Austria. Under Article 170 of the Austrian Constitution, the Federal Court can take cognisance of cases relating to the constitutionality of a Federal or State law only at the instance of the Federal Government or of the State Government or on a reference from the Supreme Court of Justice. The question of the validity of a Federal or State law cannot be raised before the Federal Court by an individual. Under the Italian Constitution, on the other hand, the question of constitutional validity can be raised by an aggrieved party in any court of law and thereupon the issue must be referred to the Constitutional Court. Similarly, under the constitutional system of the West German Republic there exists a special organ invested with the exclusive power to interpret the Constitution. This is the Federal Constitutional Court (*Bundesverfassungsgericht*) which has the sole authority to decide all constitutional issues. The Court has also been granted extraordinary

¹ See Carlos Olleró, *Evolución político-constitucional de Polonia*, Revista de Estudios Políticos, Vol. XLV., at pp. 171-172.

jurisdiction to determine the constitutionality of political parties. (See the judgements of the Court in *In re German Socialist Party*, BverfG. 1953, p. 1; and *In re Communist Party*, BverfG. 1956, p. 85). The procedure prescribed by the Constitution for the adjudication of constitutional issues is exactly the same as under the Italian Constitution. Clause (1) of Article 100 of the West German Constitution provides that if a court considers a law to be unconstitutional, the validity of which is pertinent to its decision, the proceedings must be stayed and the decision of the Federal Constitutional Court obtained. It is, therefore, clear that the jurisdiction of the Federal Constitutional Court, like that of the Italian Constitutional Court, is purely interpretative. This is further made clear by Clause (4) of Article 19 which expressly lays down that in the event of an infringement of a fundamental right, the aggrieved party has to seek relief from the ordinary courts.

The Judiciary as the Custodian of the Constitution. The third system entrusts the power to interpret and enforce the Constitution to ordinary courts of law. A typical example is furnished by the Constitution of the United States of America. Section 1 of Article 3 of the Constitution provides that the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may from time to time ordain. Under Section 2, the judicial power extends, *inter alia*, to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made under their authority. The question of interpreting the Constitution arises in respect of matters which are within the original jurisdiction of the Supreme Court or in the exercise of its appellate jurisdiction. As regards original jurisdiction, the Constitution specifically lays down that it covers all cases affecting ambassadors, other public ministers and consuls, and in cases in which a State is a party. In all other cases which fall within the judicial power of the United States, the Supreme Court has appellate jurisdiction, both as to law and fact, subject to such exceptions and regulations as the Congress may prescribe. Under the Judiciary Act, an appeal lies to the Supreme Court from the final judgements or decrees in any suit before the highest court of a State where the validity of a treaty or a statute of the United States is in question and the decision of the lower court is against its validity. An appeal is also competent where a statute of a State is alleged to be repugnant to the Constitution or to treaties or laws of the United States, and

the decision is in favour of its validity. These provisions clearly establish the position of the Supreme Court as the highest appellate authority in all cases involving interpretation of the Constitution. Therefore, the Court has rightly been described as the custodian of the Constitution. Indeed, the Court has itself declared: "this Court has no more important function than that which devolves upon it, the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and State, to the end that each may continue to discharge harmoniously with the other, the duties entrusted to it by the Constitution." (*Hammer v. Dagenhart*, 247 U.S. 251) As Story points out, the power to interpret the Constitution necessarily includes the power to declare unlawful any legislative measure or executive act which is contrary to the provisions of the Constitution. He, therefore, argues that as the Constitution is the supreme law of the land, it is the duty of every judicial authority to follow the Constitution which has predominant obligatory force in cases of conflict between the Constitution and the laws enacted by the Federation or the States.

The same system obtains under the Constitutions of Australia and Canada. Section 71 of the Commonwealth of Australia Act provides that "the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction." Therefore, subject to the limited authority of the Judicial Committee of the Privy Council, the High Court of Australia is the final authority in respect of interpretation of the Constitution. The jurisdiction of the Privy Council in regard to constitutional issues has been considerably reduced by the express provision of Section 74 of the Act that no appeal lies to the Privy Council from a decision of the High Court "upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council." The High Court of Australia has, in addition, original jurisdiction in respect of constitutional issues. Under Section 30 of the Judiciary Act, the High Court has been invested with original jurisdiction in "all matters arising under the Constitution or involving its interpretation." Moreover, under Section 40 (1) of the Act any

case arising under the Constitution or involving its interpretation may be removed from any court of a State where it is pending to the High Court for its decision. Section 40A further provides that if in any cause pending before a State Supreme Court there arises any *inter se* question, the Supreme Court shall not proceed further in the case and it shall by virtue of the Act and without any order of the High Court be removed to the High Court. In Canada, under the Supreme Court Act 1949, all appeals to the Judicial Committee of the Privy Council have been abolished and the Supreme Court of Canada has become the final court of appeal in all matters. It follows, therefore, that the court is now the final authority in all cases arising under the Constitution or involving its interpretation.

The Constitution of Argentina has also embodied the American system in regard to interpretation of the Constitution. Article 100 of the Constitution provides that "the cognisance and decisions of all cases relating to matters governed by the Constitution and by the laws of the Nation belong to the Supreme Court and the inferior tribunals of the Nation." Like the Supreme Court of the United States of America, the Argentine Supreme Court has both original and appellate jurisdiction in regard to constitutional issues. It should, however, be remembered that although the Supreme Court is the highest authority in the matter of interpretation of the Constitution, all constitutional issues can be raised in any ordinary court of law, whether Federal or State, as in the United States. The position has been thus clarified by the Supreme Court itself: "The objection of unconstitutionality urged by the plaintiff against the legislation in question does not deprive the provincial courts of jurisdiction to take cognisance of the causes regulated by provincial laws. As the Federal Constitution is the supreme law of the Nation, the authorities of each Province are obliged under Article 31 to conform to its provisions notwithstanding any contrary provision in the provincial constitutions or laws; and as they are the executors of the National Constitution, they can, and must interpret and apply as such the Constitution as they understand it, subject to appeals against their decisions under Article 13 of the Statute of the 14th September, 1863 for the purpose of correcting erroneous interpretation of the provincial courts and of safeguarding the integrity of the national law. Thus making use of its power and fulfilling its obligation of interpreting the National Constitution so as to make their decisions in conformity with it, the courts of the Province of Santa Fe have sufficient jurisdiction to decide for

themselves, without prejudice to the appeal previously mentioned, the objection of unconstitutionality urged against a provincial law the application of which has been asked for." (Fallos 10, p. 134) Two propositions clearly emerge from this statement. In the first place, questions relating to the interpretation of the Constitution can be raised before any ordinary court of law. Secondly, the final decision in regard to all constitutional issues rests with the Supreme Court. Similarly, under the Constitutions of Brazil and Mexico, all constitutional questions fall within the jurisdiction of the ordinary courts, but the final decision is vested in the Supreme Court. Under the law of Brazil, however, the right of appeal to the Supreme Court has been subjected to similar conditions as under the Judiciary Act of the United States of America.

Interpreting Authority under the Indian Constitution. The system obtaining under the Constitution of the United States of America has been closely followed and adopted by the Constitution of the Indian Republic. As in the United States, so in the Indian Republic, all questions arising under the Constitution or involving its interpretation fall within the jurisdiction of the ordinary courts of law, subject, however, to the final authority of the Supreme Court. As the Court itself has pertinently observed, "this Court has general powers of judicial superintendence over all courts in India and is the ultimate interpreter and guardian of the Constitution. It has a duty to see that its provisions are faithfully observed and, where necessary, to expound them." [*Nar Singh v. State of U.P.*, A.I.R. (1954) S.C. 457.]

The constitutional jurisdiction of the Supreme Court is both original and appellate. Its original jurisdiction arises under Article 32 of the Constitution. Clause (1) of the Article guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of a fundamental right. Clause (2) authorizes the Supreme Court to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of a fundamental right. The Supreme Court has by its decisions defined the scope of the right conferred by this Article. In the first place, the Court has made it clear beyond doubt that the remedy under Article 32 can only be permitted in the case of an infringement of a fundamental right and cannot be extended to cover cases of infraction of any other constitutional right. Thus, in *Ranjitlal v. Income Tax*

Officer, A.I.R. (1951) S.C. 97, the Supreme Court has held that the immunity from the imposition or collection of taxes except by authority of law, which is conferred by Article 265, is not a fundamental right and cannot, therefore, be enforced by a petition under Article 32. The Court observed: "It is not our purpose to say that the rights secured by Article 265 may not be enforced. It may certainly be enforced by adopting proper proceedings. All that we wish to state is that this application in so far as it purports to be founded on Article 32... is misconceived and must fail." Similarly, in *Nain Sukh v. State of U.P.*, A.I.R. (1953) S.C. 384, the Court has held that any right which the petitioners in the case may have had as rate-payers to insist that the Municipal Board should be legally constituted is not a fundamental right conferred by Part III of the Constitution and, therefore, the petitioners were not entitled to any relief under Article 32 of the Constitution. In *Kasturi & Sons Ltd. v. Salioateswaran*, A.I.R. (1958) S.C. 507, the petition was held to be valid and competent in so far as it challenged the validity of Section 17 of the Working Journalists Act, 1955, but once Section 17 was held to be valid and in order, the petition was not competent under Article 32 as no question of the fundamental rights of the petitioners was involved.

It is interesting to note that the same view has been taken by the Supreme Court of Mexico in respect of the remedy of "amparo" provided by the Mexican Constitution for the protection of constitutional guarantees. Thus, in *In re Secretaria de Hacienda v. Crédito Público*, Sem. jud., Vol. LXVI, p. 218, the Court has made the following pertinent observation: "If the constituent legislature had desired to grant the power to seek the remedy of 'amparo' against any violation of the Constitution whatsoever, it would have done so in a clear manner, but this is not the case. From the Constitutions of 1857 and 1917 and the constitutional proposals and Reform Bill which preceded them it is clear that the legislators were aware of the various systems of control which might be brought into play for remedying constitutional violations but they did not desire to invest the judicial authorities with power of every kind to annul unconstitutional legislation by means of judgement in 'amparo' but only desired to establish this procedure for the protection and enjoyment of individual guarantees."

Secondly, the Supreme Court has also laid down that a petition under Article 32 must establish not only that the impugned law is an infringement of a fundamental right but that it also affects or invades

the fundamental right of the petitioner guaranteed by the Constitution. [*Chiranjit Lal v. Union of India*, A.I.R. (1951) S.C. 41] In that case a solitary shareholder of a Company was seeking to enforce a fundamental right of the Company under Article 32, and it was held by the Court that he could not do so unless his own fundamental right had been infringed. "It was said that the complainant could not succeed because somebody else was hurt and that it was an elementary principle of law that in order to justify the grant of extraordinary relief, the complainant's need of and absence of adequate remedy at law must clearly apply." [Per Mahajan, J. in *Dwarkanadas Shrinivas v. Sholapur Spinning & Weaving Co.*, A.I.R. (1954) S.C. 119] The same view has been taken by the Supreme Court of Mexico in respect of an alleged infringement of a fundamental right by a federal or State law. Thus, in *In re Flores Garza*, Sem. jud., XXVIII, p. 1208, the Court has laid down that the procedure of "amparo" cannot be sought against an impugned legislation merely on the ground of its promulgation and that it must be proved that the impugned legislation has prejudicially affected a constitutional right of the complainant. Similarly, the Supreme Court of the United States has held that a person invoking the power of the courts must show not only that the impugned statute is invalid, but also that he personally has sustained or is in danger of sustaining, some direct injury to his property or rights from its enforcement. (*Board of Chicago v. Olsen*, 262 U.S.1) The Supreme Court of Argentina has also endorsed the view that in order to establish a plea of violation of a constitutional right "there must exist an injury to a legal right which must unquestionably flow from the impugned acts." (*Shell Mex Argentina Ltd. v. Nacion Argentina*, Fallos 229, p. 264).

It will be clear that the interpreting power of the Supreme Court under Article 32 can only be exercised in respect of the provisions of the Constitution relating to fundamental rights. Its power of interpretation in the exercise of its appellate jurisdiction is, however, much wider and extends to the entire Constitution. Under Article 132, an appeal from the judgement, decree or final order of a High Court lies to the Supreme Court in all cases involving a substantial question of law as to the interpretation of the Constitution. The Article further lays down that either the High Court must certify that the case involves such a constitutional question or where the High Court has refused to grant such a certificate, the Supreme Court may grant special leave to appeal if it is satisfied that a substantial

point of constitutional interpretation is in issue. The Article also provides that the judgement, decree or final order of the High Court against which an appeal lies to the Supreme Court may arise in a civil, criminal or other proceedings. The term "final order" has been defined in the Article as including "an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case."

The scope of the right of appeal under the Article has been thus defined by the Supreme Court in *Election Commission v. Venkata*, A.I.R. (1953) S.C. 210: "The whole scheme of the appellate jurisdiction of the Supreme Court clearly indicates that questions relating to the interpretation of the Constitution are placed in a special category irrespective of the nature of proceedings in which they may arise, and a right of appeal of the widest amplitude is allowed in cases involving such questions." Therefore, it has been held that the words "other proceedings" in Article 132 should not be construed *eiusdem generis* with what precedes. Substantial constitutional questions may arise not only in civil and criminal proceedings, but in other proceedings as well, and the Supreme Court is the final authority on all such questions. Therefore, the right of appeal from revenue proceedings cannot be excluded if substantial questions of constitutional interpretation are involved. The scope of the right has also been widened by a liberal interpretation of the term "judgement". It has been held that the term includes any decision given by the High Court on questions at issue between parties to any proceeding properly before the Court which finally determines the rights of parties so far as the Court is concerned. Thus, a decision under Section 23 (5) of the C.P. & Berar Sales Tax Act, 1947 or under the Income Tax Act, 1922 is a "judgement", because it finally determines the rights of the parties so far as the High Court is concerned, although the tribunal under these statutes may have to reopen the assessment proceedings and make or order further enquiry to give effect to the decision of the High Court. [*Sriram Gulabdas v. Board of Revenue*, A.I.R. (1954) Nag. 1.]

Arbitral Jurisdiction of the Supreme Court. Under Article 131 of the Indian Constitution, the Supreme Court has original jurisdiction in any dispute (a) between the Union Government and one or more States; (b) between the Union Government and any State or States on one side and one or more other States on the other; and (c) between two or more States. These disputes need not be confined

to conflicts of competence but include all disputes involving any question, whether of law or fact, on which the existence or extent of a legal right depends; in other words, the jurisdiction of the Supreme Court covers all disputes in respect of justiciable issues between any two Governments established under the Constitution. There are, however, two express limitations on this jurisdiction. In the first place, the Supreme Court has no jurisdiction in respect of a dispute arising under a treaty, agreement, covenant, engagement, *sanad* or other similar instrument concluded before the commencement of the Constitution but continued in operation after such commencement, to which a Part B State was a party. Secondly, the jurisdiction of the Supreme Court does not extend to a dispute arising under any treaty, agreement, covenant, *sanad* or other similar instrument which provides that the jurisdiction of the Supreme Court shall not extend to such a dispute. These two provisions are intended to exclude from the jurisdiction of the Supreme Court treaties and covenants concluded with the former Princely States. It is, however, curious that the first limitation is only applicable to Part B States and does not cover the former Princely States not included under that category; nor is it clear why this distinction has been made between these two classes of former Princely States. The justification for the exclusion of these classes of agreements is no doubt based on the fact that many of them are of a political character. This does not, however, afford any ground for the exclusion of justiciable issues arising under these agreements. It should be noted that both these provisions reproduce similar provisions of the Government of India Act, 1935, which excluded from the jurisdiction of the Federal Court all treaties and agreements with the Indian States which did not relate to the Act or any Order in Council made thereunder or to the Instrument of Accession. The point is, however, purely academic, as, under the latest amendments to the Constitution, Part B States have ceased to exist.

The original jurisdiction which has thus been conferred on the Supreme Court has two distinctive characteristics. In the first place, if the parties to a dispute fall within the categories specified under this provision, the Supreme Court has jurisdiction irrespective of the nature of the matter in issue provided that it is a justiciable issue. The dispute may arise under the Constitution or under the common law. It may also arise under an agreement between the parties. In Australia, it has been said that "the matters between States, in

respect of which original jurisdiction is by Section 75 of the Constitution conferred on the High Court, are matters which are of a like nature to those which can arise between individuals and which are capable of determination upon principles of law." (*The State of South Australia v. The State of Victoria*, 12 C.L.R. 667) This, however, is too narrow a definition and cannot be held to be applicable under the Indian Constitution. The wording of Article 131 is wide enough to include every kind of justiciable issue. The more correct view is, therefore, to be found in the judgement of Shiras, J. in *Missouri v. Illinois*, 180 U.S. 208: "The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a State. But such cases manifestly do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy; and it would be objectionable, and indeed, impossible, for the Court to anticipate by decision what controversies can, and what cannot, be brought within the original jurisdiction of this Court."

The second feature is that the jurisdiction is *ratione personarum* and not *ratione materiae*. In other words, it is confined to disputes between Governments established under the Constitution or between individuals suing or being sued on behalf of such Governments. It has been argued that on the basis of the corresponding provision of the Government of India Act, 1935, the original jurisdiction of the Supreme Court extends to disputes between a State and a private individual or between the Federation and a private individual. This view does not, however, appear to be tenable. This proposition is open to two objections. In the first place, the Indian Constitution does not recognize dual citizenship, i.e. there is no citizenship of a State as distinguished from Union nationality. There is, therefore, no special *cinculum juris* between a constituent State and residents in such States, and no such State could, therefore, be a party to a dispute arising between another State and one of its residents. The position is no doubt different under international law where a State has a special obligation towards its own citizens. It is also different in a federal State where the rule of double citizenship is recognized. But such an obligation could not arise under the Indian Constitution. The second objection is that this original jurisdiction of the Federal Court is in essence an arbitral jurisdiction and depends entirely on the special character of the

parties specified in the Constitution and could not, therefore, be extended to cases where an individual is one of the parties.

The authority of the Supreme Court under Article 131 of the Indian Constitution may be contrasted with the original jurisdiction of the High Court of Australia under Section 75 of the Commonwealth Act which extends to disputes "between residents of different States, or between a State and a resident of another State." The position is similar under the Constitution of the United States of America which confers original jurisdiction on the Supreme Court in all cases affecting ambassadors, other public ministers and consuls, and those in which a State is a party. This has been further explained in Section 233 of the Federal Judicial Code which provides that the Supreme Court shall have original but not exclusive jurisdiction in respect of all controversies between a State and citizens of other States or aliens. Under Article 110 of the Swiss Constitution, the jurisdiction of the Federal Tribunal can be invoked in civil cases "between the Confederation on the one part, and corporations and individuals on the other part". Disputes between Cantons and corporations or individuals also fall within the original jurisdiction of the Federal Tribunal. But this authority is subject to the limitation that in the first case the corporations or individuals must be the plaintiffs and must also fulfil the conditions prescribed by federal legislation. In the second case, it can only be invoked when either party so demands and the matter is in conformity with the conditions prescribed by federal legislation. The Constitution of Argentina also expressly provides that the Supreme Court has jurisdiction in respect of disputes between a Province and citizens of another or between citizens of different Provinces. The reason of the rule has been thus explained by the Supreme Court: "The Federal jurisdiction is an exceptional jurisdiction which has been introduced in the judicial mechanism of the Republic with political and social objects of the greatest importance. Borrowed from the North American Constitution, it takes into consideration, amongst us as in the great Republic, the primordial interest of peace and cordial international relations and safeguards internal public order from the danger of the partiality and zeal of the judges in favour of their fellow citizens and against the citizens of another province." (Fallos 67, p. 107).

Unitary Organization of Judicial Power. While the political organization of the Indian Republic is primarily federal in character,

its judicial organization is purely unitary. In other words, the Indian Constitution does not recognize the duality of judicial machinery; nor does it prescribe a scheme of distribution of judicial power between the Union and the States. In the Indian Republic there exists only one judicial system with the Supreme Court as the final authority. There are no federal courts administering federal laws, and all courts administer federal laws as well as State laws. This unitary organization is a relic of the system prevailing in British India which was a unitary State prior to the Government of India Act, 1935. It should, however, be remembered that Article 247 of the Constitution authorizes the Union Parliament to provide by law for the establishment of additional courts for the better administration of federal laws and of any existing laws relating to a matter in the Union List. The position is similar under the Constitution of the Soviet Union. Article 104 of the Soviet Constitution specifically provides that the Supreme Court of the Soviet Union is the highest judicial organ and is charged with the supervision of the judicial activities of all judicial organs of the U.S.S.R. and of the Union Republics. This provision is in consonance with the centralistic character of the Soviet Union which, in spite of the residuary powers of the constituent States, approximates to a unitary State.

The position under other federal constitutions is, however, entirely different. For instance, in the Commonwealth of Australia there exist two parallel systems of Federal Courts and State Courts. Section 71 of the Australian Constitution Act provides that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other Federal Courts as the Parliament may create, and in such other courts as it may invest with federal jurisdiction. It has been held that the provisions of this section are complete and exhaustive and there cannot be a third class of courts which are neither Federal Courts nor State Courts invested with federal jurisdiction. (Per Griffith, C.J. in *New South Wales v. Commonwealth*, 20 C.L.R. 54) On the other hand, the judicial organization of the States is regulated by the laws and Constitutions of the States. Therefore, the two judicial systems are distinct and separate. It follows as a logical consequence that the High Court of Australia has no jurisdiction over the Courts of the States except in cases where the State Courts are exercising federal jurisdiction or where an appeal lay to the Queen in Council from such State Courts at the establishment of the Commonwealth.

The same double apparatus is to be found in the United States, in West Germany and in the Latin American Federations.

The judicial power under the Constitution of the United States is only partially unified and centralized. This is also the position under the Argentine Constitution. As the Supreme Court of Argentina has itself declared, "the only source of jurisdiction of the Federal Tribunals is Article 100 of the Constitution, and the competence to judge directly the nullity or validity of a law of the Provincial Legislature cannot be deduced from it." (Fallos 30, p. 139) The Court has also laid down that its jurisdiction is of an exceptional character and cannot, therefore, be extended by interpretation to causes not expressly specified in the Constitution. (Fallos 10, p. 134) Under the Constitution of Brazil there exists the same system of dual machinery of judicial organization. Article 94 of the Constitution deals with the organization of courts exercising federal jurisdiction, i.e. jurisdiction in respect of the Constitution, federal laws and treaties concluded by the Federal Government. Article 124, on the other hand, deals with the organization of the judicature of the States.

The unitary character of the judicial organization under the Indian Constitution is clearly reflected in the provisions relating to the position which the Supreme Court occupies under the Constitution as the head of the judicial organization. These provisions strengthen and reinforce the authority of the Supreme Court as the highest tribunal of the Republic. Thus, Article 141 declares that the law laid down by the Supreme Court shall be binding on all courts within the territory of India. Similarly, Article 144 prescribes that all authorities, civil and judicial, in the territory of India, shall act in aid of the Supreme Court. Under Article 142 the Supreme Court may, in the exercise of its jurisdiction, pass such decree or make such order as is necessary for doing complete justice in any case pending before it and any such decree or order is enforceable throughout the territory of India. Moreover, the Union Parliament has been authorized by the Constitution to confer on the Supreme Court such further jurisdiction and powers as the Parliament may consider necessary. In particular, the Union Parliament has been granted the authority to confer on the Supreme Court the power to issue directions, orders or writs or any of them for any purposes other than those of redressing the infringement of a fundamental right. The Union Parliament has also been empowered to confer upon the Supreme

Court such supplemental authority as may appear to be necessary or desirable for the purpose of enabling the Court more effectively to exercise the jurisdiction conferred upon it by the Constitution. It may also be pointed out that the Constitution expressly confers on the Supreme Court the jurisdiction and powers exercisable by the Federal Court immediately before the commencement of the Constitution under any existing law. Under Article 145 of the Constitution, the Supreme Court has been invested with the authority to make rules, with the approval of the President, for regulating generally the practice and procedure of the Court. These include rules as to the persons practising before the Court, rules as to the procedure for hearing appeals and other matters, rules as to the proceedings for the enforcement of fundamental rights and rules as to the entertainment of appeals.

Appellate Jurisdiction of the Supreme Court in Civil Cases.

The unitary character of the judicial organization under the Indian Constitution is also reflected in the extensive appellate jurisdiction which has been vested in the Supreme Court. Under Article 133 an appeal lies to the Supreme Court from any judgement, decree or final order in a civil proceeding of a High Court in the territory of India. The right of appeal in civil suits conferred by this Article is, however, limited to three different categories of cases. In the first place, an appeal lies to the Supreme Court if the High Court certifies that the amount or value of the subject matter of the dispute in the court of first instance and in dispute on appeal was and is not less than Rs. 20,000 or such other sum as may be specified by the Union Parliament by law. Secondly, an appeal also lies if the High Court certifies that the judgement, decree or final order involves directly or indirectly some claim or question regarding property of the like amount or value. It is clear that the Article prescribes the test of valuation in these two cases, but the relevant value is not the value of the suit but the value of the dispute. "The language of the Constitution appears to be more accurate, because in any contention between two parties the value of the subject matter must be the value of the issue between them and not always the value of the suit which may be different." [*Prabirendra Mohan v. Berhampur Bank Ltd.*, A.I.R. (1954) Cal. 289] Both these cases are, however, subject to the limitation that if the judgement, decree or final order appealed from affirms the decision of the court immediately below, the High Court must also certify that the appeal involves some substantial question of law. The

rule is now well settled that a question of law can be said to be a substantial question of law only when there is some doubt or difference of opinion. Chagla, C.J. has thus observed: "It must be a substantial question of law as between the parties in the case involved. But here again it must not be forgotten that what is contemplated is not a question of law alone; it must be a substantial question. One can define it negatively. For instance, if there is a well-established principle of law and that principle of law is applied to a given set of facts, that would certainly not be a substantial question of law. Where the question of law is not well settled or where there is some doubt as to the principle of law involved, it certainly would raise a substantial question of law which would require a final adjudication by the highest court." (*Kaikhushroo Ghiara v. C.P. Syndicate Ltd.*, A.I.R. (1946) Bom. 134] Thirdly, the right of appeal also accrues if the High Court certifies that the case is a fit one for appeal to the Supreme Court. The fitness of a case for appeal to the highest court has been thus defined by the Privy Council: "It is clearly intended to meet special cases, such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance." (*Banarsi Prasad v. Kashi Krishna*, 28 Ind. App. 11) It is now well settled that the only condition necessary for the exercise of jurisdiction in such cases is the discretion of the High Court but the discretion is a judicial one and must be judicially exercised along the well-established lines which govern these matters. The certificate must also show on the face of it that the discretion conferred was invoked and exercised. If it is properly exercised on well-established and proper lines, then, as in all questions where an exercise of discretion is involved, there would be no interference except on very strong grounds. On the other hand, if on the face of the order it is apparent that the Court has misdirected itself and considered that its discretion was fettered when it was not, or that it had none, then the Supreme Court must either remit the case or exercise the discretion itself. "These are the well-known lines on which questions of discretion are dealt with in the superior courts and they apply with as much force to certificates under Article 133 (1) (c) as elsewhere." [Per Bose, J. in *Nar Singh v. State of U.P.*, A.I.R. (1954) S.C. 457] In all these cases the mere grant of the certificate does not preclude the Supreme Court from determining whether it was rightly granted and whether the conditions prerequisite to the grant are satisfied.

Three other rules relating to the exercise of the right of appeal

under Article 133 should also be noticed. First, in all these cases the appellant is also entitled to urge as one of the grounds of appeal that a substantial question of law as to the interpretation of the Constitution has been wrongly decided. Second, the right is subject to the limitation that no appeal lies to the Supreme Court from the judgement, decree or final order of a single judge of a High Court, unless the Union Parliament provides otherwise by law. Third, the Supreme Court itself has prescribed a further limitation on the exercise of its appellate jurisdiction. It has laid down that it would not go behind the findings of fact by the final court of facts, but where the conclusion of the High Court is based partly on a misreading of evidence and partly on non-advertence to important material evidence, it would interfere with the findings by examining the evidence. [*Moran Mar Baselios Catholicos v. Paulo Avara*, A.I.R. (1959) S.C. 31] Therefore, where there are no concurrent findings of fact, the Supreme Court will allow the appellant to place before the Court the evidence of his witnesses in support of his contentions. [*Asiatic Steam Navigation Co. v. Arabinda Chakravarti*, A.I.R. (1959) S.C. 597].

Appellate Jurisdiction in Criminal Matters. The Supreme Court has similar appellate jurisdiction in criminal matters from any judgement, final order or sentence of a High Court. This jurisdiction can, however, be invoked only in three different classes of cases. In the first place, the jurisdiction can be invoked if the High Court on appeal reverses an order of acquittal of an accused person and sentences him to death. This provision does not, however, permit an appeal from a judgement, final order or sentence in a criminal proceeding of a High Court if the High Court has on appeal reversed an order of conviction of an accused person and has ordered his acquittal. [*State Government of Madhya Pradesh v. Ramkrishna*, A.I.R. (1954) S.C. 20] Secondly, an appeal also lies to the Supreme Court if the High Court has withdrawn for trial before itself any case from any court subordinate to its authority and has in such a trial convicted the accused person and sentenced him to death. Thirdly, the jurisdiction of the Supreme Court can also be invoked if the High Court certifies that the case is a fit one for appeal to the Supreme Court. This is, however, subject to such provisions as may be made in this behalf by the Supreme Court as well as to such conditions as the High Court may establish or require. The grant of a certificate under this provision as under Clause (c) of Article 133 (1) does not preclude

the Supreme Court from determining whether the certificate was rightly granted and whether the conditions precedent to the grant are satisfied. Moreover, the grant is at the discretion of the High Court, but the discretion is a judicial one and must be judicially exercised in accordance with the well-established principles which govern these matters. The discretion may legitimately be exercised in cases where there are exceptional circumstances [*Nar Singh v. State of U.P.*, A.I.R. (1954) S.C. 457] or where a substantial question of law is involved [*S. K. Gupta v. B. K. Sen*, A.I.R. (1959) Cal. 106] or where there is substantial miscarriage of justice. [*Jamuna Prasad v. Lacchhi Ram*, A.I.R. (1954) S.C. 686] The jurisdiction may, however, be extended by an Act of the Union Parliament, for the Constitution expressly authorizes the Union Parliament to confer by law on the Supreme Court further powers to entertain and hear appeals from any judgement, final order or sentence in a criminal proceeding of a High Court subject to such conditions and limitations as may be specified in such a law.

It will be noticed that the authority of the Supreme Court under this Article can only be exercised in respect of criminal proceedings. It has been pointed out that the words used in the Article are "criminal proceeding" and not "proceeding under the Criminal Procedure Code" or "proceeding with respect to an offence". Therefore, it has been held that "if, without being an offence, as defined in the Code or some other statute, contempt of court is still a crime or something in the nature of a crime and if a proceeding taken for the punishment of such contempt can be a criminal proceeding without being a proceeding governed by the Code, the terms of Article 134(1) (c) will nonetheless be satisfied, although contempt of court may not be an offence and although the Code may not apply to proceedings for its punishment." [*S. K. Gupta v. B. K. Sen*, A.I.R. (1959) Cal. 106].

All appeals in criminal proceedings do not, however, fall within the purview of this jurisdiction. Thus, in a special appeal against the decision of an Election Tribunal, the Supreme Court has held that as a court of appeal it will not examine the conclusions of fact arrived at by the Tribunal. All that the Supreme Court is concerned with is whether a tribunal of reasonable and unbiased men could judicially reach such a conclusion. Under the law the decision of the Tribunal is meant to be final. That does not, however, take away the jurisdiction of the Supreme Court but it will only interfere when there

is some glaring error which has resulted in a substantial miscarriage of justice. [*Jamuna Prasad v. Lachhi Ram*, A.I.R. (1954) S.C. 686] Similarly, it has been held that the plea of alibi involves a question of fact and when both the Courts below concurrently found that fact against the accused the Supreme Court cannot, on an appeal under Article 134 of the Constitution, go beyond that concurrent finding of fact. [*Thakur Prasad v. State of Madhya Pradesh*, A.I.R. (1954) S.C. 30].

Extraordinary Jurisdiction of the Supreme Court. In addition to its appellate and arbitral jurisdiction, the Supreme Court has been authorized under Article 136 to grant, in its discretion, special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal. The only exception to this wide and extensive jurisdiction is that no appeal lies to the Supreme Court from any judgement, determination, sentence or order passed or made by any Court or tribunal constituted by or under any law relating to the Armed Forces. Subject to this limitation, it is clear, this extraordinary jurisdiction of the Supreme Court extends to all cases and all matters, whether civil, criminal or otherwise. It has also been held that even when a Legislature states that the orders of a tribunal under an Act like the Representation of the People Act, 1951 shall be conclusive and final, the Supreme Court may interfere under Article 136, as the jurisdiction conferred by the Article cannot be taken away or whittled down by the Legislature. [*Raj Krishna Bose v. Binod Kanungo*, A.I.R. (1954) S.C. 202] Therefore, so long as this provision exists, the discretion of the Supreme Court is unfettered.

As regards the exact scope of the jurisdiction conferred by Article 136, it has been expressly held by the Supreme Court that "it is not possible to define with any precision the limitations on the exercise of the discretionary jurisdiction vested in the Supreme Court by the constitutional provision made in Article 136. The limitations, whatever they may be, are implicit in the nature and character of the power itself. It being an exceptional and overriding power, naturally it has to be exercised sparingly and with caution and only in special and exceptional situations. Beyond that it is not possible to fetter the exercise of this power by any set formula or rule." [*Dhakeswari Cotton Mills Ltd. v. Commissioner of Income Tax*, A.I.R. (1955) S.C. 65] Therefore, the Supreme Court will not grant special leave to appeal under Article 136 unless it is shown that exceptional and

special circumstances exist, that substantial and grave injustice has been done and the case in question presents features of sufficient gravity to warrant a review of the decision appealed against. [*Sadhu Singh v. State of Pepsu*, A.I.R. (1954) S.C. 271] The Supreme Court has also made it clear that it cannot by special leave convert itself into a court to review evidence for a third time. Similarly, where there are mere mistakes on the part of the Court below of a technical character which have not occasioned any failure of justice or if the question is purely one of the Supreme Court taking a different view of the evidence in the case, there can be no interference under the provisions of Article 136, since such questions are as a general rule treated as being for the final decision of the Courts below. [*Habeeb Mohammad v. State of Hyderabad*, A.I.R. (1954) S.C. 51] The position is, therefore, clear that in an appeal by special leave under Article 136 of the Constitution it is not ordinarily permissible to make submissions on questions of fact. [*Ram Parkash v. The State of Punjab*, A.I.R. (1959) S.C. 1] This rule is not, however, universally applicable. Therefore, it is open to the appellant under Article 136 to raise questions of fact or to ask for interference with concurrent findings of fact if the findings are vitiated by errors of law or the conclusions by the Courts below are so patently opposed to well-established principles as to amount to a miscarriage of justice. [*Ratan Gond v. The State of Bihar*, A.I.R. (1959) S.C. 18] Moreover, "when the Court reaches the conclusion that a person has been dealt with arbitrarily or that a Court or tribunal within the territory of India has not given a fair deal to a litigant, then no technical hurdles of any kind like the finality of finding of facts or otherwise can stand in the way of the exercise of this power, because the whole intent and purpose of this Article is that it is the duty of this Court to see that injustice is not perpetuated or perpetrated by decisions of the Courts and tribunals because certain laws have made the decisions of these Courts or tribunals final or conclusive." [Per Mahajan, C.J. in *Dhakeswari Cotton Mills Ltd. v. Commissioner of Income Tax*, A.I.R. (1955) S.C. 65 at p. 69] The main question, therefore, is whether there has been a failure of justice or not, and if there has been a failure, the Court will interfere even if it involves an examination and appreciation of the facts of the case. [*Pritam Singh v. The State*, A.I.R. (1950) S.C. 169] The Court has, therefore, laid down that it does not, when hearing appeals under Article 136, sit as a court of further appeal on facts, and does not interfere with findings given on a

consideration of evidence, unless they are perverse or based on no evidence. [*Dinabandhu Sahu v. Jadumoni Mangaraj*, A.I.R. (1954) S.C. 411].

It will be noticed that whereas Articles 132, 133 and 134 expressly provide that "an appeal shall lie to the Supreme Court" in the cases specified in these Articles, Article 136 merely authorizes the Supreme Court to grant, in its discretion, special leave to appeal from any judgement passed by any court or tribunal. The Supreme Court has, therefore, rightly pointed out that Article 136 does not confer a right of appeal on any party from the decision of any tribunal, but confers a discretionary power on the Supreme Court to grant special leave. The power conferred by the Article is discretionary and cannot, therefore, be exhaustively defined. The Court has further laid down that though Article 136 is couched in widest terms, it is necessary for the Supreme Court to exercise its discretionary jurisdiction only in cases where the judgements or orders are made in violation of the principles of justice causing substantial and grave injustice to parties or where an important principle of law is involved requiring elucidation and final decision by the Supreme Court or where exceptional or special circumstances exist which merit the consideration of the Supreme Court. [*Messrs. Bengal Chemical & Pharmaceutical Works Ltd. v. Their Employees*, A.I.R. (1959) S.C. 633].

Advisory Jurisdiction of the Supreme Court. Article 143 of the Indian Constitution provides that if at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Supreme Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion on the matter. Clause 2 of the Article further authorizes the President to refer to the Supreme Court for opinion any dispute arising out of any provision of a treaty, covenant, *sanad* or other similar instrument which was concluded before the commencement of the Constitution between a Part B State and the Dominion of India. The jurisdiction conferred by Article 143 is of an exceptional nature and finds very few parallels in other constitutions. For instance, there is no such provision in the Constitution of the United States of America, nor in the Commonwealth of Australia Act. It has, therefore, been held by the Supreme Court of the United States that "it has no constitutional power to render advisory

opinions." (*Walker v. Hutchinson*. 352 U.S. 112) The Constitutions of the Latin American Federations also present no such provision. Therefore, the Supreme Court of Argentina has specifically laid down that "the object of the federal jurisdiction being the decision in causes, no abstract questions of law can be entertained by the Supreme Court." (Fallos 4, p. 75) A strikingly similar provision is, however, to be found in Section 26 of the Irish Constitution which authorizes the President of the Irish Republic, after consultation with the Council of State, to refer a Bill to the Supreme Court for a decision on the question as to whether such Bill or any specified provision was repugnant to the Constitution. Thus, by virtue of this power, Section 4 of the Offences against the State Bill was referred to the Supreme Court for opinion. [See *In the Matter of Article 26 of the Constitution and in the Matter of the Offences against the State (Amendment) Bill*, 1940; (1940) I.R. 470]. A similar provision was to be found in the Soviet Constitution of 1923, Article 43 of which granted authority to the Supreme Tribunal of the Soviet Union to express its opinions at the request of the Central Executive Committee of the Union regarding the constitutionality of the laws of the federated republics. This was, however, a purely consultative jurisdiction and the final decision rested with the Praesidium of the Central Executive Committee. A Soviet jurist has thus characterized this provision: "This principle is fully in accord with the general character of our Constitution, founded upon the concept of the dictatorship of the proletariat which does not permit the separation of powers, that is to say, a system of a series of political institutions which mutually balance one another and exercise their influence upon one another." (*Sovietskoe Pravo*, 1925, No. 3) This principle does not, however, find any place in the existing Constitution. On the other hand, Section 60 of the Canadian Supreme Court Act, 1906 authorizes the Governor-General in Council to refer important questions of law relating to specified matters to the Supreme Court for hearing and consideration. Moreover, it is obligatory on the part of the Supreme Court to pronounce its opinion in such cases. Advisory opinions given in exercise of such powers have been strongly condemned by the Privy Council. For instance, in *Attorney-General of British Columbia v. Attorney-General of Canada*, (1914) A.C. 153, Lord Haldane observed as follows: "Under this procedure questions may be put which it is impossible to answer satisfactorily. Not only may the question of future litigants be

prejudiced by the Court laying down principles in an abstract form without reference or relation to actual facts but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied." It has also been observed that it is undesirable that the Court should be called upon to express opinions which may affect the rights of persons not represented before it. However, the power under Section 60 of the Canadian Supreme Court Act, 1906 has been availed of in several important cases, particularly in respect of cases where there were grave doubts of constitutional validity. [See, for instance, *In re Marriage Legislation*, (1912) A.C. 880].

It should be pointed out that an opinion given by the Supreme Court under Article 143 of the Constitution is not of the character of a judgement and is not, therefore, binding upon the courts in India, although such opinions may undoubtedly carry great weight and authority with all courts and tribunals. We have already seen that the same view has been taken under other constitutions where such a provision exists. Thus, under the Irish Constitution the advisory opinion tendered by the High Court of the Republic is not a judgement in the strictest sense of the word and the final decision rests with the authorities invoking the jurisdiction of the court. We have also seen that this was exactly the position under the Soviet Constitution of 1923.

Original and Appellate Jurisdiction of the High Courts. It has already been pointed out that under the authority of the Supreme Court, there is a High Court in every constituent State of the Republic. (See Chap. V, *The Structure of the Republic*). In the main, the Constitution preserves and continues the jurisdiction and powers exercised by the High Courts prior to its commencement. The only exception is that the previous statutory restrictions on the exercise of original jurisdiction in respect of revenue matters has now been removed. Apart from this change, Article 225 of the Constitution, which deals with the jurisdiction of the High Courts, reproduces Section 223 of the Government of India Act, 1935. In other words, under the Constitution, the High Courts continue to exercise such original and appellate jurisdiction, including admiralty jurisdiction, and all such powers and authority in relation to the administration of justice as were vested in them by their Charters or letters patent and statutory enactments. The Constitution further provides that every High Court shall have superintendence over all courts and tribunals

throughout the territories in relation to which it exercises jurisdiction. It does not, however, deal with the jurisdiction of the courts subject to the authority of the High Courts, such as district courts and courts subordinate to them. The jurisdiction exercised by such courts is regulated by statutory enactments, such as the Code of Civil Procedure, the Code of Criminal Procedure, etc.

CHAPTER XI

AMENDMENT OF THE CONSTITUTION

Legislative and Constituent Powers. Both constitutional theory and practice distinguish between legislative and constituent powers. Legislative power, as the term itself indicates, is the power to enact laws, rules and regulations governing in the main the relations between individuals or corporate bodies not partaking of the character of an organ of the State. The term "constituent power" connotes the power to formulate laws and principles regarding the organization of the State, the functioning of its authorities and the reciprocal relations between the State and its citizens. The difference between the two powers is, therefore, *ratione materiae*; in other words, the subject matters of the exercise of the two powers belong to two different categories. There is a further point of difference. Legislative power accrues from a constitutional grant and is, therefore, subject to such limitations and conditions as may be prescribed by the constitution. Constituent power, on the other hand, is, as Virga points out, inherent in the juridical order.¹ More appropriately it may be described as an essential element of the juridical sovereignty of a State, whether such sovereignty appertains to a single individual or a group of individuals or the entire body of the people. There are two different schools of thought regarding the origin of constituent power. One claims that constituent power is inherent in the sovereignty of the people.² The other, of which Schmitt is an exponent, contends that "the constitution of a State is the political decision of the holders of constituent power, which may impose its will on the community."³ The correct view would, however, appear to be that constituent power is an emanation of the sovereignty of a State,

¹ *La Revisione Costituzionale*, Palermo, 1948, p. 8.

² Barile, *La Revisione della Costituzione*, Commentario Sistematico alla Costituzione Italiana, Vol. II, pp. 473-474.

³ *Verfassungslehre*, Munich and Leipzig, 1928.

whatever be the authority in which such sovereignty is vested. Therefore, constituent power "being the supreme source of the formulation of constitutional norms" is plenary and not subject to any limitation. The power to amend the constitution is of the same character as constituent power but is derivative and limited. It is derived from constituent power under the constitution and is subject to such limitations as may be specified in the constitution. Esmein describes it as "a sort of constitutional delegation". The difference between constituent and amending powers is, therefore, quantitative rather than qualitative. As Mortati observes, the difference is one of extent and object; "while the constitution establishes a total order, erects a system of values in respect of a fundamental conception of an associative life and comprehends the institution of the State in all its complexity; revision, on the other hand, adapts particular norms or institutions to new exigencies without altering the fundamental features of the body of the constitution. It follows that while constituent power is exhausted in the very act of creating the constitution, the power to amend the constitution develops at intermittent periods as gradually the need for adaption manifests itself."¹

A flexible constitution, whether written or unwritten, makes no distinction between legislative and constituent powers in so far as both these powers are constitutionally vested in the institutions which constitute the ordinary legislature. The classical example is the Constitution of the United Kingdom. Under the constitutional laws of Great Britain, Parliament is *de jure* sovereign, and, therefore, exercises all powers of sovereignty, whether legislative or constituent. It follows that although there is a difference in the content of constitutional laws and ordinary laws, in actual practice as well as in theory there is no distinction between constituent and legislative powers. All laws, whether constitutional or ordinary, take the same form and are enacted, amended or repealed in the same manner. Thus, for instance, the Parliament Act of 1911, which introduced a radical change in the legislative authority of the House of Lords, is an ordinary piece of legislation. A written constitution may be equally flexible, although such instances are rare. The Italian *Statuto del Regno* of 1848 furnishes an interesting example. The Statute was expressly declared to be "irrevocable" and "perpetual", but, as Santi Romano

¹ *Concetto, Lipilli, Procedimento della Revisione Costituzionale*, Studi di Diritto Costituzionale, p. 379.

points out, it "has rightly been regarded as a flexible constitution and, except during the Fascist regime which required the opinion of the Grand Council, amendments of the Constitution have always been held to be within the exclusive competence of the legislature without the necessity of any special procedure." (Op. cit., p. 243) It is, therefore, evident that under a flexible constitution, whether written or unwritten, the problem of adapting the constitutional laws and principles to social and political changes is easily resolved. The position is, however, entirely different under a rigid constitution which must by its very nature be a written constitution. A rigid constitution is considered to be the supreme law and is, therefore, sacrosanct and immutable. The idea of immutability is inherent in the concept of a rigid and written constitution, and it cannot, as a consequence, be amended or altered by the ordinary process of legislation. But, as Esmein points out, "every rigid and written constitution, unless it be profoundly illogical and supremely imprudent, must establish a procedure according to which it may be revised and modified." (Op. cit., Vol. II, Chap. XII) The importance of this historical truth was not, however, apparent to the framers of the earliest written constitutions who were animated by the desire to establish a permanent legal order. Thus, for instance, Cromwell's *Instrument of Government*, which Jellinek considers to be the first draft of a written constitution of modern times, was designed to establish a constitution both stable and unalterable on a parity with the Magna Carta. Written constitutions did not, however, come into vogue until after the birth of the North American Republics, and they did not provide for any machinery for amendment or revision. For instance, the French Constitution of 1814 expressly stated that "the concession and the grant are made for us as well as for our successors and for ever." All these constitutions were made unalterable because the framers believed that they were perfect and, therefore, immutable. The fallacy of this argument, however, soon became evident, and various procedures began to be adopted for amending the constitution but at the same time protecting it against hasty and ill-considered changes. This is the genesis of the rigid constitutions of today.

Three Systems of Constitutional Amendment. Various methods have from time to time been adopted in written and rigid constitutions, particularly in those of a federal character, with a view to providing for their stability and simultaneously to making it possible for their amendment to meet the changing social and political

circumstances. There are three principal systems of constitutional amendment.

The first is the system of constituent assemblies. Under this system an assembly is especially elected for the purpose of amending the constitution and for no other purpose; and constituent powers are entrusted to this *ad hoc* body. This is the procedure which is followed by certain member States of the American Federation for the total revision of their constitutions. The initiative for such revision belongs to the legislature and is subject to the vote of the electorate; but if the vote is favourable, the amendment is effected by a Convention especially elected for the purpose. It will be noticed that the procedure under the system is assimilated to that of a constituent assembly and is, therefore, too cumbersome a machinery for partial revision or amendment. Article 72 of the Chinese Constitution of 1947 offers an interesting variant of the system. It provides for the creation of a permanent body known as the National Assembly which has no legislative function but has been invested with the power to amend the Constitution. All proposals for constitutional amendments must be made by one-fifth of the members of the Assembly and approved by a majority of two-thirds of the members present and voting.

The second is the system of constituent legislatures. Under this system constituent powers are vested in the ordinary legislature subject to the condition of a special majority. For instance, the Chinese Constitution provides that constitutional amendment may also be effected by the ordinary legislature, the Legislative Yuan, provided that the amendment is proposed by one-fourth of its members and approved by a three-fourths majority. Article 91 of the Polish Constitution of 1952 provides that at least one-half of the total number of deputies must be present and the amendment must be carried by a majority of two-thirds of the members present and voting. Under Article 146 of the Soviet Constitution a constitutional amendment requires a majority of two-thirds of the members present and voting of the Supreme Soviet. Article 102 of the Turkish Constitution provided for a special majority of two-thirds of the total number of members of the National Assembly. Article 72 of the Czechoslovak Constitution of 1948 prescribes a three-fifths majority of the total number of deputies. Under Article 131 of the Constitution of Belgium two-thirds of the members of each House of the Legislature must be present and the amendment must be approved by two-thirds of the members present and voting. Further, there is

an interesting provision in the Belgian Constitution. It prescribes that when an amendment has been decided upon by an ordinary majority, there must be fresh elections before the amendment can be approved by the legislature. The second method of amendment incorporated in the Constitution of Brazil of 1946 falls under this category. Clause 3 of Article 217 of the Constitution provides that "if an amendment obtains the vote of two-thirds of the members of one of the Chambers, in two debates, it shall immediately be submitted to the other; and if approved in the second Chamber by the same procedure and by an equal majority, it shall be considered as accepted."

The third is the system of ratification. According to this procedure, the amending power is constitutionally entrusted to the ordinary legislature with or without the condition of a special majority, but amendments passed by the legislature do not become effective unless they are ratified by the electorate or, in a federal State, by the majority of the legislatures of the constituent units. A complex formula has been incorporated in the Constitution of the United States. Two different kinds of devices have been adopted to make constitutional amendments as difficult as possible so that the equilibrium of powers between the Federation and the constituent States is not easily disturbed. In the first place, as distinguished from the ordinary process of legislation, amendments can only be proposed by a majority of two-thirds of the members present and voting of both Houses of the Federal Legislature, or by a special majority of the legislatures of the member States. (*Rhode Island v. Palmer*, 253 U.S. 350) This is the first safeguard against any encroachment on the powers of the constituent States. Secondly, all amendments proposed either by the Federal Legislature or on the application of the constituent States must be ratified by a special majority of the legislatures of the member States or by Conventions held in three-fourths of the States. So far in every case the amendments have been proposed by the Federal Legislature and ratified by the States. From the foregoing account it will be clear that the Constitution of the United States provides a double safeguard against unnecessary amendment. In the first place, it requires that there must be a special majority of the Congress before any amendment can be proposed. The second safeguard is that ratification by three-fourths of the member States of the Federation is essential. The provision of the Mexican Constitution is exactly similar. Article 35 of the Constitution provides that all constitutional amendments or additions must be decided upon in the

Federal Congress by the vote of two-thirds of the members present and voting. In addition, they must be approved by the majority of the legislatures of the constituent States. This double safeguard has also been adopted in the Japanese Constitution of 1946. There amendment to the Constitution must be decided upon by two-thirds of the total number of members of each House of the Diet and ratified by the majority of the electors.

On the other hand, the Swiss Constitution prescribes a slightly different procedure. It distinguishes between partial and total revision. In the case of total revision, the Constitution demands, in the first place, a preliminary decision of the Federal Legislature or of the people establishing the necessity of such a revision. Apart from this, the Constitution lays down that an amendment must be proposed by an ordinary majority of the Federal Legislature and ratified by the majority of Swiss citizens taking part in the vote and the majority of the Cantons. It should, however, be noted that the result of the popular vote in each Canton is considered to be the vote of the Canton. This system differs from the American system in regard to two important points. First, the Swiss Constitution does not prescribe a special majority of both Houses of the Federal Legislature. Second, whereas in the United States the vote of the State legislatures is taken as the vote of the States, in Switzerland the vote of the people is taken as the vote of the States. The Australian Constitution closely follows the Swiss procedure, although it does not make any distinction between partial and total revision. Section 128 of the Commonwealth Act provides that all proposals for the alteration of the Constitution must be passed by an absolute majority of each House of the Federal Legislature. It must then be submitted to the electors in each State qualified to vote for the election of the members of the Lower House of the Federal Legislature. Section 128 finally prescribes that if in a majority of the States a majority of the electors approve of the proposed amendments, and if a majority of all the electors voting also approve of the amendments, they shall be presented to the Governor-General for the assent of the Crown. The Austrian Constitution prescribes a majority of two-thirds of the members present and voting in the National Assembly and a referendum in cases of total revision or if so demanded by one-third of the members of the Federal Legislature. A similar combination of a special majority and referendum is to be found in the Argentine Constitution.

The Amending Procedure under the Indian Constitution.

The Indian Constitution has adopted a combination of the second and third systems described above. It differentiates between two kinds of constitutional provisions, ordinary and protected. As regards the ordinary provisions of the Constitution, Article 368 provides that an amendment may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be submitted to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill. In other words, it prescribes a double majority: an absolute majority of the total number of members of each House of the Federal Legislature and a two-thirds majority of the members present and voting in each House.

It should be pointed out that the procedure outlined above is not sufficient for the amendment of those articles of the Constitution which we have described as protected. As regards these provisions, the Constitution has expressly prescribed an additional procedure. Constitutional amendments of this character must not only be passed in each House of Parliament by a majority of the total number of members of that House and by a majority of not less than two-thirds of the members present and voting, but must also be ratified by the Legislatures of not less than one-half of the constituent States. Such a ratification must be evidenced by resolutions passed by the Legislatures before the amendments are submitted to the President for his assent. This part of Article 368, therefore, corresponds to the third system we have described above.

The provisions of the Constitution which require ratification relate primarily to the distribution of executive and legislative powers as well as to the judicial organization of the Republic. The first protected provision deals with the election of the President by an Electoral College consisting of the elected members of both Houses of the Union Parliament and the elected members of the Legislative Assemblies of the States. (Article 54) The second provision lays down principles for securing uniformity in the scale of representation of the different States at the election of the President. (Article 55) Another protected provision is Article 73 which deals with the extent of the executive power of the Union. Article 162 which relates to the executive power of the States is similarly protected. Chapter I

of Part XI also falls within the purview of this special procedure. This chapter deals in the main with the question of the distribution of legislative powers between the Republic and its constituent States. The three Legislative Lists, i.e. the Union List, the Concurrent List and the State List which give details of the content of the legislative power of the Union as well as of the States have similarly been safeguarded. Chapter IV of Part V which lays down in detail the constitution, powers and status of the Union Judiciary also falls within this category. The provisions of the Constitution relating to the High Courts of the States have been similarly placed in an entrenched position. It should also be noted that Article 368 itself belongs to this category. An examination of these protected provisions makes it abundantly clear that the primary object of prescribing the procedure of ratification is to protect against hasty and ill-considered amendment the delicate equilibrium in the distribution of powers between the Union and the constituent States. There is, however, another protected provision for which it is difficult to find any reasonable justification. This is Article 241 which authorizes the Union Parliament to constitute by law a High Court for a State specified in Part C of the First Schedule. It is difficult to understand why the framers of the Constitution attached such a great importance to this provision, for in the changing political circumstances of the country the peculiar status of Part C States was bound to be of a transitional character. Therefore, it would have been more in consonance with the dynamic character of the Constitution that a provision of this nature should have been easily alterable. In fact, as we have already seen, Part C States have disappeared under the Constitution (Seventh Amendment) Act, 1956.

Analysis of the Amending Procedure under the Indian Constitution. The three main elements of the procedure prescribed by Article 368 of the Constitution are (a) the form, (b) the initiative, and (c) the process of deliberation and discussion. As regards the exact form of constitutional amendments, it is evident that they must be in the form of a Bill. It is, however, difficult to understand why this particular form has been prescribed. The Indian Constitution is not a statute or enactment of an ordinary legislature, and there does not appear to be any reason why an amendment to the Constitution should take the form of an ordinary Act. It is true that the Australian Constitution speaks of a law for amending the Constitution, but in that case the Constitution itself is an Act

of Parliament of Great Britain. The position under the Indian Constitution may be contrasted with that of the Constitution of the United States under which all amendments are in the form of resolutions of the two Houses of the Congress.

The second element relates to legislative initiative in respect of constitutional amendment. Article 368 expressly states that "an amendment of this Constitution may be initiated only by the introduction of a Bill." As it has to be a Bill, it may originate in either House of the Indian Parliament and may be proposed by any member thereof. The right to initiate a constitutional amendment is, therefore, confined to the Government or to the members of the Union Parliament. Unlike other republican constitutions, there is under the Indian Constitution no scope for popular initiative; nor can an amendment be proposed by the Governments or Legislatures of the States.

As regards the third element, the Constitution does not differentiate between the procedure for ordinary legislation and that for constitutional amendment. A constitutional amendment has to be in the form of a Bill and is necessarily subject to the rules and regulations relating to the ordinary legislative procedure. Unlike other Constitutions, as, for example, the Constitution of Brazil, the Indian Constitution does not lay down any special process for constitutional amendment. Finally, it is to be noted that a Bill dealing with constitutional amendments has to be presented to the President for his assent and is, therefore, subject to the power of the President to withhold assent under Article 111 of the Constitution. These provisions make it clear that under the Indian Constitution constitutional amendments have been assimilated to the position of ordinary legislation in all its fundamentals. The law of the United States is, on the other hand, totally different. There a resolution of the Congress embodying a constitutional amendment need not be submitted to the President for assent before it is sent to the State legislatures for ratification. (*Hollingsworth v. Virginia*, 3 Dall. 378) As Black points out, the Congress in proposing an amendment to the Constitution is not performing an ordinary act of legislation but a function of a constitutional convention, and, therefore, the assent of the President is not necessary and he has no power to veto it. (Op. cit., p. 40. See also *Hawke v. Smith*, 253 U.S. 221.) Curiously enough, the framers of the Indian Constitution have closely followed the Australian model completely ignoring the fact that unlike the Australian Constitution, the Indian

Constitution is not an ordinary enactment of a legislature but the sovereign act of a constituent assembly.

Limitations on the Amending Power. The question now arises: what is the extent of the amending power in a rigid constitution? Is it competent for the amending authority to alter the constitution in such a manner as to abrogate its fundamental character? Are there no limitations placed upon the amending power in a rigid constitution? Durand has argued at length that the constituent authority in a federal constitution is the supreme authority in the State and is, therefore, vested with power to amend and alter the constitution without any restriction. He contends that a nation has the imprescriptible right to change its constitution because one generation cannot definitely restrict the authority of the future generations inasmuch as the sovereignty of the people is inalienable and imprescriptible. According to him, the formal provision of a constitution can only render its amendment more difficult in regard to certain matters; they cannot impose an absolute limitation for all times; they can only subject the amendment of the constitution to certain forms, procedure and interval of time. (*Op. cit.*, pp. 293-297) Jellinek holds the same view. According to him, "a federal State being sovereign, there is no obstacle to the extension of its competence in regard to member States; this enlargement may go to such an extent as to destroy completely the character of a member State as such, and the federal State may consequently transform itself into a unitary State." (See Durand, *op. cit.*, p. 303) Whatever may be the theoretical basis of this view, it cannot for a moment be disputed that the answer to the question must necessarily depend on the circumstances of each case. It may be quite legitimate to contend that a constitution cannot last for ever and that political situations might lead to the alteration of its fundamental features. The question, however, arises: whether it is legally competent for the amending authority to alter the constitution in total disregard of the limitations incorporated in it? The answer to this question, it must be admitted, depends on the character of the restrictions embodied in the constitution and not on any metaphysical speculation regarding the structure of the State.

An analytical examination of the existing constitutions clearly shows that the provisions relating to the quantum of the amending power fall under two different categories. As Ollero observes, "we come across in various constitutional texts provisions of a series

of limitations on the future revision of the fundamental law." Thus, for example, the Czechoslovak Constitution of 1948 distinguishes between "Fundamental Articles" and "Detailed Provisions of the Constitution" and places the former beyond the power to amend. Similarly, the Italian Constitution expressly declares that "the republican form of government shall not be subject to any proposal for revision." The French Constitution of 1946 also placed beyond the amending power of the Constitutional Committee the political principles enunciated in the preamble as well as the procedure prescribed for constitutional amendment. Under the Constitution of the United States, the only express limitation on the amending power is that the equal representation of the States in the Senate cannot be altered without the consent of the States. Article 128 of the Commonwealth of Australia Act subjects the amending power to the proviso that no alteration diminishing the proportionate representation of any State in either House of the Federal Parliament or the minimum number of representatives of a State in the House of Representatives or increasing or diminishing the limits of the State shall become law without the approval of the majority of the electors voting in that State. An important question, therefore, arises in this connection: what is the legal force and effect of such limitations? In Italy it has been argued that the limitation on the amending power in respect of the republican form of government can be removed by a double process of revision. In the first place, Article 139, which prohibits any change in the republican form, may itself be repealed by a constitutional amendment since the power to amend embraces all the provisions of the Constitution. Once this limitation has been removed, the republican form may then be changed by means of the procedure specified in Article 138. A similar view has been taken in Australia. For instance, Wynes argues that the power of amendment extends to alteration of "this Constitution", which includes Section 128 itself. It is, therefore, contended that it would be competent to amend the provisions of Section 128 with the consent of a majority of the States and thus remove the last paragraph containing the limitation, which would then be a dead letter. Once this limitation has disappeared, a further amendment could subsequently be made and would become a valid law. (Op. cit., pp. 362-363) It is submitted that this view of the matter cannot be sustained. The amending power conferred by the constitution of a State must necessarily be subject to the restrictions

expressly prescribed by the constitution itself. This is a logical corollary of the rule that the grant of a power must necessarily be subject to its terms.¹ Thus, for instance, it was held by the Privy Council in *Attorney-General for New South Wales v. Trethowan*, (1932) A.C. 526, that the constituent power conferred on the Legislature of New South Wales could only be exercised in accordance with the terms of the statute conferring that power. In that case the question was whether the Legislature of the State of New South Wales had power to abolish the Legislative Council of the State or to alter its constitution or powers without first taking a referendum of the electors upon the issue. The Legislature of New South Wales had enacted a constitution Act which provided that the Legislative Council shall not be abolished nor shall its constitution or powers be altered except in the manner provided in the statute. This provision had expressly laid down that a Bill for the purpose of abolishing the Legislative Council or for altering its constitution or powers shall be submitted to the electors qualified to vote for the elections of the members of the Legislative Assembly. An attempt was made to get rid of this legislation by two Bills which purported to repeal this provision of the statute and to abolish the Legislative Council. On the application of the petitioners an injunction was granted restraining the presentation of the Bills to the Governor-General until they had been submitted to the electors and a majority of them had approved of the legislative measures. Dealing with this issue, their Lordships of the Privy Council observed as follows: "The question then arises, could that Bill, a repealing Bill, after its passage through both Chambers, be lawfully presented for the royal assent without having first received the approval of the electors in the prescribed manner? In their Lordships' opinion the Bill could not lawfully be so presented. The proviso in the second sentence of Section 5 of the Act of 1865 states a condition which must be fulfilled before the Legislature can validly exercise its power to make the kind of laws which are referred to in that sentence. In order that Section 7A may be repealed (in other words, in order that the particular law respecting the constitution, powers and procedure of the Legislature may be validly made) the law for that purpose must have been passed in the manner required by Section 7A, a colonial law for the time being in force in New South Wales." The same view has been taken

¹ See Morati, *Concetto, Limiti, Procedimento della Revisione Costituzionale*, Studi di Diritto Costituzionale, pp. 394 et seq.

by the High Court of Australia in *Cooper v. Commissioner of Income Tax*, 4 C.L.R. 1304. It follows, therefore, that in all these cases, the amending power can only be constitutionally exercised in accordance with the provisions of the constitution. The correct view has been adopted in the United States of America where it is generally held that the limitation on the power of amendment cannot lawfully be removed by any amending process and that the equal suffrage of the States in the Senate can only be altered with the consent of all the States as laid down in the Constitution.¹

The constitutions belonging to the second category do not impose any limitations whatsoever on the amending power. Thus, while Article 1 of the Argentine Constitution of 1853 states that "the Argentine nation has adopted for its government a republican, federal and representative form, such as the present Constitution establishes," Article 30 confers authority to amend the Constitution in its entirety or in respect of specific provisions. The amending power under the Mexican Constitution is also unrestricted. Article 40 of the Constitution declares that "the will of the Mexican people is to constitute itself into a representative, democratic and federal Republic composed of States, free and sovereign in regard to their internal regime, but united in a federation established in accordance with the principles of the present fundamental law." Article 38, however, confers unlimited authority to amend the Constitution inasmuch as it lays down that "the people preserve for all times the inalienable right to alter or modify the form of their government." The Constitution of Switzerland does not also prescribe any limitations on the amending power. On the contrary, Article 118 definitely provides that the Constitution may at any time be revised in its entirety or in respect of specific particulars. The provisions of the Austrian Constitution are of a similar character. The grant of amending power does not lay down any restrictions, but declares that the Constitution may at any time be amended in its entirety by the people. Similarly, under Article 96 of the Japanese Constitution, there is no express limitation on the amending power, but an implied limitation may be deduced from paragraph 2 of this Article which lays down that amendments when ratified shall form "an integral part of this Constitution." The Indian Constitution also belongs to this category. Article 368 contains no prohibition or limitation. The words used

¹ Willoughby, *Constitutional Law of the United States*, p. 521.

in the Article are "amendment of this Constitution". The question, therefore, arises: is there any implied limitation in the wording of this Article? With reference to Section 128 of the Commonwealth of Australia Act, it has been argued that "as applied to such a subject matter as a written constitution, the word 'alter', according to its natural meaning, is wide enough to include the substitution of one type of constitution for another, and does not suggest that the distinctive characteristics of the constitution in its original form must, as of necessity, be reproduced in its form as altered." Hence it has been argued that "the *prima facie* meaning of Section 128 is that it gives power to replace the present Constitution of the Australian Union by a constitution which need no longer be strictly federal at all."¹ On the other hand, it has been contended that the term "amendment" has a restricted meaning. Black, for instance, observes: "As applied to a constitution, the word 'amendment' may refer to some particular article and indicate an addition to it or a change in it or its repeal, or it may refer to the addition of a principle or a new and independent subject, complete in itself. Doubtless there might be amendments so revolutionary in character, and so inconsistent with the spirit and purpose of the original constitution, that grave question could be made as to the authority of Congress to propose them or of the States to accept them." (Op. cit., p. 39) This argument does not, however, appear to be tenable because the term "amendment" has no such restricted meaning. According to the *Shorter Oxford Dictionary*, the word "amendment" is derived from the Latin word *emendare*, and, *inter alia*, means "removal of faults or errors, reformation" or "the alteration of a Bill before Parliament; hence concretely a proposed alteration (which if adopted may even defeat the measure)." If this be the correct meaning of the word, then it must necessarily include any change or alteration in the Constitution or even its replacement by another constitution. This was also the view accepted by the Solicitor-General for the United States in his argument in the *National Prohibition Cases*, 253 U.S. 350: "It has always been understood that there is no limitation upon the character of amendments which may be adopted, except such limitations as are imposed by Article V itself." On the basis it may rightly be contended that there is under the Indian Constitution no limitation on the amending power; in other words, the amending power under

¹ Canaway, *The Failure of Federalism in Australia*, Appendix.

the Indian Constitution is as wide and extensive as the power of a constituent assembly.

Rigidity of the Indian Constitution. We are now in a position to examine the charge of excessive rigidity which has been levelled against the Indian Constitution by no less an authority than Sir Ivor Jennings. According to him, "flexibility is regarded as a merit and rigidity a defect because it is impossible for the framers of a Constitution to foresee the conditions in which it would apply and the problems which will arise." This argument is, however, entirely fallacious. Stability is considered to be one of the essential attributes of a constitution. It has rightly been argued that as the constitution of a State is the foundation of its organization and juridical order, it must have permanence and stability as otherwise it would be incapable of fulfilling its mission. The striking role which the constitution plays in the life of a State is derived not only from the importance of its content but also from its character of immutability. On the other hand, the constitution must be capable of adjusting itself to new circumstances as they arise. A certain measure of flexibility is, therefore, necessary, but this does not mean that the rigidity of a constitution is a defect. The constitution of a State must be flexible as well as stable. If we seek principles, we must seek principles of change as well as principles of stability. One of the main problems to which the framers of a constitution must address themselves is how to reconcile the idea of a stable juridical order, affording no scope for sudden or hasty changes, with the idea of growth and development. It is, therefore, a mistake to over-emphasize either flexibility or rigidity. What is necessary is a judicious blending of the two elements. It should also be remembered in this connection that a flexible constitution may be successful in one political climate but a total failure in another. As Esmein correctly observes, the satisfactory functioning of a flexible constitution presupposes the existence of deep-rooted traditions as well as a profoundly conservative spirit, as in the United Kingdom. On the other hand, in democratic republics, where the people are endowed with "an impetuous and mobile spirit", the rigid system of France and the United States is preferable. (Op. cit., Vol. I, at p. 617) When Sir Ivor criticizes the rigidity of the Indian Constitution, he forgets the truth of this observation and completely ignores the political and social circumstances prevailing in India as well as the ethos of the Indian people.

Further, it must be admitted that a certain measure of rigidity is

essential to the successful working of a federal constitution. As we have seen, the basic feature of a federation is the delicate distribution of powers between the central government and the component units. It follows, therefore, as a necessary corollary that a federal constitution must provide sufficient guarantee for the continuation of this equilibrium, and it is rigidity which alone furnishes the necessary protection. Sir Ivor may consider flexibility to be a merit of a constitution, but all federal constitutions, it has to be pointed out, are of a rigid character. The only exception is the Constitution of the Dominion of Canada, as amended by the British North America Act, 1949, which confers constituent powers on the Federal Legislature of the Dominion. But in this case as well, it should be remembered, certain important provisions of the Constitution have been placed beyond the powers of the Federal Parliament and these can only be amended by the Parliament of Great Britain. The Indian Constitution does not, therefore, present an exception to the general rule that all federal constitutions can only be amended by means of a special procedure. The question, therefore, arises: is the amending procedure under the Indian Constitution more conducive to rigidity than the procedure prescribed in other federal constitutions? The answer is clearly in the negative. We have already seen that three different systems of constitutional amendment are to be found in federal constitutions, and an analytical examination of these systems clearly establishes the fact that it is under the second system, i.e. the system of special majorities that a constitution can more easily be amended and is, therefore, more flexible in character. We have also seen that it is this system which has been adopted in the Indian Constitution in regard to the majority of the constitutional provisions. It is only in respect of the protected provisions that the Indian Constitution prescribes the system of ratification. It is, therefore, clear that the Indian Constitution is no more rigid than any other federal constitution; on the contrary, it is more flexible than many existing federal constitutions such as those of Australia, Switzerland and the United States of America. Finally, it has to be pointed out that Sir Ivor's charge is completely negatived by the fact that the Constitution has already been amended as many as seven times within the short span of its existence.

Sir Ivor has argued: "What makes the Indian Constitution so rigid is that in addition to a somewhat complicated process of amendment, it is so detailed and covers so vast a field of law that the problem

of constitutional validity must often arise." We have already seen that the amending procedure embodied in the Indian Constitution has also been adopted in many other constitutions and is much less complicated than the system obtaining in Switzerland and the United States. Further, the so-called rigidity of the Indian Constitution cannot be attributed to the fact that it contains detailed provisions and covers a vast field of law. Sir Ivor contends that the "golden rule for constitution-makers, therefore, is never to put in anything which can safely be left out. The fact that a provision is thought to be desirable does not imply that it should be in the Constitution." There is no evidence whatsoever from any constitution in support of this assertion. As an eminent authority has rightly observed, "the tendency in recent times has been to extend the number and variety of matters which are deemed sufficiently important to warrant provisions which shall be rendered more or less immutable by inclusion in the Constitution." (Wynes, *op. cit.*, p. 357, n. 3) Thus, for instance, the Italian Constitution of 1848 contained 84 articles only, but the present Constitution of Italy has very nearly double the number. Similarly, there are as many as 254 articles in the Constitution of Brazil of 1946, whereas the Constitution of 1891, as amended in 1925 and 1926, contained 90 articles only. A still more remarkable case in point is furnished by the constitutional history of France. The basic organization of the Third Republic was entirely covered by 26 articles of the Law of 1875, but the Constitution of 1946 had as many as 106 articles. These instances clearly show that there is no such thing as the "golden rule" of which Sir Ivor speaks. Nor do the recent constitutional developments in Europe, America and Asia lend any support to the argument advanced by him that if a constitution cannot be amended easily, it should be as short and simple as possible.

Moreover, according to Sir Ivor, "what the Constituent Assembly has done is to produce a long and complicated document which cannot easily be amended. It is quite obvious that there are clauses which do not need to be constitutionally protected. An example taken at random is Article 224 which empowers a retired Judge to sit in a High Court." There are two objections to this argument. In the first place, it cannot be disputed that the mere fact that a constitution has long and detailed provisions does not necessarily mean that it is a rigid constitution. On the contrary, detailed provisions render it unnecessary to introduce any constitutional amendment. It also

saves a great deal of litigation: a point which seems to have been completely missed by Sir Ivor. Thus, the Indian Constitution has settled once for all many important problems which in the United States of America took several years of litigation to settle. Secondly, Article 224 of the Indian Constitution to which Sir Ivor refers is a permissive and not a mandatory provision. Its incorporation in the Constitution does not, therefore, make it any more rigid, although provisions of this character have undoubtedly added to its bulk, but this does not justify the charge of rigidity which Sir Ivor has brought against it. Further, what appears to Sir Ivor as unnecessary may have been considered extremely important by the Indian Constituent Assembly. Similar provisions are also to be found in the Italian Constitution of 1947, as, for example, Article 35, which, *inter alia*, provides for the appointment of professors of law as members of the Constitutional Court. Another instance is Article 187 of the Constitution of Brazil of 1946 which, *inter alia*, lays down that the appointment of University professors shall be for life. The foregoing examination makes it quite clear that the amending procedure embodied in the Indian Constitution does not differ fundamentally from the procedures laid down in other constitutions; on the contrary, most of the articles of the Indian Constitution can be more easily amended than the Constitutions of Switzerland and the United States of America.

In this connection it is also necessary to examine another contention which has been advanced by Sir Ivor. He has not only attacked the length of the Indian Constitution but also complains of "one remarkable omission from the Constitution." He says: "The delimitation of constituencies is governed by ordinary legislation in accordance with Article 327. Now this is very odd, because one would have thought this to have been a function of the greatest constitutional importance. Britain allows it to be regulated by ordinary legislation, but Britain is also unique in its trust in its politicians." This criticism, is, however, totally unwarranted. In the first place, like many other constitutions, the Indian Constitution does lay down the governing principles of the delimitation of constituencies. Article 81 expressly states that for the purpose of election to the Lower House of the Union Parliament the States shall be divided, grouped or formed into territorial constituencies. It also prescribes that the number of seats to be allotted to each constituency shall be so determined as to ensure that there shall be not less than one member for 750,000 of the

population and not more than one member for every 500,000. There is a further provision that the ratio between the number of members allotted to each territorial constituency and the population of that constituency shall, so far as practicable, be the same throughout the territory of India. Similar guiding principles for the formation of territorial constituencies for election to the Lower Houses of the State Legislatures have been incorporated in Article 170 of the Constitution. Secondly, as the Constitution concedes to the Union Parliament the power to alter the boundaries of any constituent State, it could not appropriately prescribe the details of the rules relating to the delimitation of constituencies, because such delimitations must undoubtedly be affected by alterations in the boundaries of a State. Thirdly, the question of delimitation of constituencies may be a matter of great importance to a highly industrialised State with a limited extent of territory and a high rate of density of population, but it does not have equal importance in a vast country like India where seventy-five per cent of the population live in rural areas. It would, therefore, be clear that once the Constitution had determined the general principles of the formation of territorial constituencies, the details of delimitation lost their importance and have legitimately been left to the discretion of the Union Parliament and the State Legislatures. Fourthly, it is not correct to say that England is the only country where the delimitation of constituencies is regulated by ordinary legislation. On the contrary, there are very few written constitutions which deal with the details of this matter. This is abundantly borne out by the recent Constitutions of France, Italy, Czechoslovakia, Poland, Brazil and Japan. It is, therefore, obvious that there is no foundation for the criticism which has been made against the Indian Constitution on this ground.

CHAPTER XII

EXTERNAL RELATIONS OF THE INDIAN REPUBLIC

International Status of the Republic. Independent States are the normal type of international personality. The term "independence" has been thus defined by the Permanent Court of Arbitration: "Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of the States during the last few centuries, and, as a corollary, the development of international law, have established this principle of exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations." (*Island of Palmas Case*, XIX, p. 16) Dealing with the question of Austria, the Permanent Court of International Justice observed that the independence of Austria meant "the continued existence of Austria within her present frontiers as a separate State with the sole right of decision in all matters, economic, financial or other, with the result that that independence is violated as soon as there is any violation thereof, either in the economic, political or any other field, these different aspects of independence being in practice one and indivisible." (*German-Austrian Customs Union Case*, Series A/B, 41). There are, however, other categories of States which have been recognized as international persons despite the fact that they did not enjoy full and complete independence. For instance, the British Dominions, although under the authority of the British Parliament, acquired full status in international law long before the Statute of Westminster made them completely independent, at least in practice. Prior to 1947, India also belonged to this category. Originally a dependency of the British Crown, she had since the Treaty of Versailles gradually acquired full and

complete international personality. From the point of view of constitutional law, India, which comprised British India and the Indian States, was not a unit, since there was no constitutional nexus between British India and the States. Further, British India was *de jure* under the authority of the British Parliament until the Indian Independence Act, 1947. In *Davidson's case*, where the question arose as to whether the Extradition Convention between France and Great Britain was applicable to a crime committed in India, the Court of Appeal of Aix, France observed as follows: "India is an integral part of the British Empire, the King of Great Britain being at the same time Emperor of India. India is not represented diplomatically abroad. Hence there is reason to maintain that the convention between France and Great Britain ought to be applied in this case." (Sirey, 1938. III. 9). It is submitted that the *ratio decidendi* in this case is not consistent with the recognized principles of international law. The mere fact that a State has no diplomatic representation abroad does not necessarily exclude it from the category of international persons. According to Bustamante, there are three different manifestations of external sovereignty (a) nomination of diplomatic representatives and consular agents; (b) conclusion of treaties; and (c) participation in international conferences, which is "the most frequent form of the exercise of independence and one of the tests for deciding which States are in actual enjoyment of such authority."¹ India was a signatory to the Treaty of Versailles. She was a member of the League of Nations. She was a party to several international conventions and treaties. It was, therefore, incorrect to assume, as the French Court did, that she had no international personality apart from Great Britain. The correct view of the matter has been stated by Anzilotti: "It is beyond doubt, if evidence is not to be ignored, that the Dominions and India have become subjects of international law by virtue of their character as autonomous parts of the British Empire."² The fact that India occupied an inferior position in the constitutional field in relation to the Dominions did not affect this position. As McNair has rightly pointed out, Newfoundland and Southern Rhodesia, which internally were completely self-governing, had no special international status, while India, which was not completely self-governing, did have such a status in international law.³

¹ *Diritto Internazionale Pubblico*, Vol. I., p. 240.

² *Diritto Internazionale*, Vol. I., pp. 199-205.

³ *The Law of Treaties*, pp. 75-76.

The question now arises: what was the effect of the Indian Independence Act, 1947 on this position? It will be noticed that the Act envisaged two simultaneous but distinctly separate processes. The first was the termination of British authority in India. Section 7 of the Act expressly stated that His Majesty's Government in the United Kingdom shall have no authority as regards the government of any of the territories which were included in British India. It is evident that this constitutional change did not affect the status which India had enjoyed in the field of international affairs. It is a well-established rule of international law that changes in the form of government do not generally affect the international status of a State. The rule was thus laid down by the House of Lords in *Lazard Bros. v. Midland Bank*, L.R. (1933) A.C. at p. 307: "This internal change in the system of government, once the new government is recognized by this country, has no effect on the external status of Russia, *quoad* this country as a personality of international law. The identity of the State remains the same for international purposes: the change from monarchy does not, in general, abrogate treaties or conventions any more than loss or increase in territory." The position in regard to India was, however, complicated by the second process. The Indian Independence Act not only terminated the authority of the British Government in India but also brought about the division of British India into two Dominions which the Act described as India and Pakistan. These two Dominions were intended to be separate and independent States, either within or without the British Commonwealth, and the maxim *novus populus sui juris nascitur* was obviously applicable. The question, therefore, arose as to whether India had completely disappeared as an international personality as a result of the Statute and two new States had come into existence or the Dominion of India continued the juristic *persona* of undivided India, whereas the Statute created a new State consisting of those territories which are included in the Dominion of Pakistan.

It has been contended that "both from a practical and legal point of view India as an entity continued to exist, except that certain Provinces now sought to secede. The seceding areas were free to have any relations they liked with foreign Powers. The Government of India was intact and there should be no further confusion of Hindustan and Pakistan and people should not allow such ideas to grow." (Pandit Jawaharlal Nehru, *The Statesman*, July 17th, 1948). A certain measure of support for this view can be found in the opinions

expressed by some of the international publicists. According to Hyde, "there may be no extinction of the personality of a State by disintegration or dismemberment when a substantial portion of its territory amounting to as much as one-quarter, one-third or one-half of its domain passes to a successor."¹ Max Huber has also observed that "absolute secession may be assumed where the portion about to become independent is negligible compared with the rest."² This view, however, appears to be erroneous. The continuance of the international personality of a State does not necessarily depend on the quantum of territory which is surrendered to the new State. For instance, in 1807, under the Treaty of Tilsit, Prussia was obliged to surrender as much as one-half of its territory, but she continued to exist as a separate State. Such was also the case with Saxony in 1815. Similarly, when in 1822, Brazil, which was considerably larger than Portugal in area and population, seceded from the Kingdom of Portugal, the juristic *persona* of the Kingdom continued to exist in the eye of international law. When, after the first World War, Turkey was compelled to relinquish considerable portions of her territory, it was contended on her behalf before the arbitrator on the question of the Public Debt of the Ottoman Empire that old Turkey had ceased to exist and a new Turkey had been created as a result of the dismemberment of the Turkish territories. This view was not, however, accepted by the arbitrator. Sack holds the view that "the old State ceases to exist in the case where it suffers total annexation or total partition or dismemberment; on the other hand, it preserves its existence when it loses only a portion of its territory as a result of cession or separation."³ This is, no doubt, correct, because in almost all cases of secession the international personality of the parent State continues to exist since the secession takes effect as a result of an act of international law to which the parent State is a party. But, as Bustamante points out, even in the case of total dismemberment the international personality of the parent State may continue if in the act of dismemberment one of the portions of the territory makes it clear that it preserves not only the name but also the legal personality of the parent State.

The correct view, therefore, appears to be that the continuance of the international personality of a State after territorial transformations

¹ *International Law*, Vol. I., p. 205.

² *Die Staatsakzeption*, p. 34.

³ *Les Effets des Transformations des Etats*, Vol. I., p. 70.

does not necessarily depend on the quantum of territory which is retained by it but on the following factors: (i) the transaction leading to the territorial changes must be an act of international law; (b) the parent State must be a party to the transaction in its international capacity; and (iii) there is nothing in the transaction indicating in any manner the extinction of the international personality of the parent State. On the other hand, if the dismemberment is effected by an act of the municipal law of the State, there must be an implied or express indication that the international personality of the parent State is to continue. In the case of India, as we have already noticed, there was no act of international law to which she was a party in her international capacity. Nor is there anything in the Indian Independence Act, 1947, even remotely suggesting that the Dominion of India was a continuation, pure and simple, of India's juristic personality. On the contrary, it is manifest from the provisions of the Act that the territory of British India was in its entirety partitioned between the two new Dominions. It was not, therefore, a case of "breaking away" but clearly of total dismemberment; and there is no express or implied reservation in the Act that the juristic *persona* of India would continue. Hence, the correct view appears to be that India had ceased to exist in international law, and her place had been taken by the Dominions of India and Pakistan.

The view expressed above is, however, diametrically opposed to the declaration made by the Secretary General of the United Nations Organization: "From the viewpoint of international law the situation is one in which part of an existing State breaks off and becomes a new State. On this analysis there is no change in the international status of India; it continues as a State with all treaty rights and obligations and, consequently, with all rights and obligations of membership in the United Nations. The territory which breaks off—Pakistan—will be a new State. It will not have the treaty rights and obligations of the old State and will not, of course, have membership in the United Nations. In international law the situation is analogous to the separation of the Irish Free State from Britain and of Belgium from the Netherlands. In these cases the portion which separated was considered a new State and the remaining portion continued as an existing State with all the rights and duties which it had before." It must, however, be pointed out that these observations cannot be supported. In the first place, the weight of opinion amongst international publicists is definitely against the statement that when Belgium separated

from Holland, the parent State of the Netherlands continued to exist with all the rights and duties which it had before. For instance, Pradier-Fodéré categorically asserts that the dismemberment of the Kingdom of the Netherlands resulted in "the suppression of the ancient State". Fauchille is equally emphatic. According to him, the international State of the Netherlands ceased to exist, having been divided into two new States, Belgium and Holland. Bustamante takes the same view and treats the Belgian case as one of total dismemberment. This is also fully in accord with the opinion expressed in the Protocol of the 27th January, 1831, concluded in London between the plenipotentiaries of Great Britain, Austria, France, Prussia and Russia. It is, therefore, clear that the Belgium case does not lend any support to the view that the Dominion of India was merely a continuation of the international personality of undivided India.

In the second place, the analogy of the Irish Free State is clearly inapplicable. It is a well-known fact that the Irish Free State came into existence as a result of a treaty concluded by Great Britain in her capacity as an international personality. Such was also the legal genesis of States like Mexico, Brazil and Chile. The position was entirely different in the case of India. The Dominion of Pakistan did not set itself up as an independent State by virtue of an agreement with India. There was no act of international law to which India was a party and which was the source of the independence of Pakistan. The situation would have been totally different if India had become a Dominion before the partition and had thereafter agreed to the secession of those areas which are included in Pakistan. A similar result would have followed if, before the passing of the Indian Independence Act, India had, with the approval of the British Parliament, concluded a treaty with the seceding areas for the constitution of a separate State. This, however, was not the case. Two separate Dominions were created by virtue of a Statute of the British Parliament and not by an international agreement to which India was a party. In these circumstances, it would appear that the international personality of undivided India had been extinguished by dismemberment under the Indian Independence Act, 1947.

The question is, however, of an academic character, since the problems which arose as a result of the partition of India have been resolved not according to any particular view of the matter. For instance, the Indian Independence (Rights, Property & Liabilities) Order, 1947 presents a strange amalgam of the principles of succession

and secession. Some of the provisions of the Order are in accordance with the view that the juristic *persona* of undivided India had been extinguished and two new States have come into existence, while others rest entirely upon the assumption that the Dominion of India continued the international personality of undivided India and Pakistan was only a seceding State. Article 4 of the Order provides that land situated outside the territorial limits of the two States and not being used for any official purpose by the representative of India comes under the joint control of the two States. This undoubtedly would have been the case under international law if both the States were *novus populus*. On the other hand, if Pakistan was only a seceding State it was not entitled to any property belonging to undivided India which was situated outside Pakistan territories. This was equally true in respect of goods, coins, bank notes and currency notes which, under Article 6 of the Order, came under the joint control of both the States if they lay outside their territorial limits. On the assumption that the Dominion of India was a continuation of the juristic *persona* of undivided India and Pakistan was only a seceding State, the Dominion of Pakistan could not claim as a matter of right any share in such property in so far as it lay outside its territories. It would, therefore, be evident that some of the provisions of the Order expressly negative the application of the principle of secession to the international relations between India and Pakistan. The same confusion of principles is to be found in the Indian Independence (International Arrangements) Order. For instance, Article 4 of the Schedule to this Order reads as follows: "Subject to Articles 2 & 3 of this agreement, rights and obligations under all international agreements to which India was a party immediately before the appointed day will devolve upon the Dominion of India and upon the Dominion of Pakistan and will, if necessary, be apportioned between the two Dominions." The rule embodied in this Article is directly opposed to the generally accepted principle of international law. As Kiatibian has rightly observed, "the treaties of a dismembered State are *res inter alios acta* as regards the new State. In effect, the latter has never given its consent to the treaties as a juristic person; and its special interests have not been taken into consideration except as an element in the appreciation of the general interests of the entire State, the main object of the treaties."¹ However, whatever view

¹ *Conséquences juridiques des transformations des États sur les Traités*, p. 60.

may be taken of the legal consequences of the partition of India, there can be no doubt that the Republic of India was and continues to be a juristic personality of international law.

Exclusive Competence of the Union in International Affairs.

We have already pointed out that one of the fundamental characteristics of a federation is that it is a constitutional as well as an international unit. It follows, therefore, as a logical corollary that the central government of a federation must necessarily enjoy exclusive power and authority in respect of external matters. It further follows that it is the federation alone which possesses international personality and is, consequently, the sole representative of the federating units in the field of international affairs.

It has rightly been pointed out that the marks of a sovereign State in international law are that the community constituting it is primarily established for a political end; that it possesses a definite territory; and that it is independent of external control. It is, therefore, clear that "so soon as a society can point to the necessary marks and its intention of conforming to law, it enters of right into the family of States, and must be treated according to law. The simple facts that a community in its collective capacity exercises undisputed and exclusive control over all persons and things within the territory occupied by it, that it regulates its external conduct independent of the will of any other community and in conformity with the dictates of international law, and, finally, that it gives reason to expect that its existence will be permanent, are sufficient to render it a person in law." (Hall, *op. cit.*, pp. 16 et seq.) A cursory examination of all federal constitutions reveals the indisputable fact that the constituent States of a federation do not conform to the requirements of international persons as set forth above. It is no doubt true that these States are primarily established for a political end. It is equally true that they possess a defined territory. It is, however, quite contrary to facts to assert that they regulate their external conduct independent of the will of any other community. Hence in all federal States the constituent units have neither any capacity nor any existence in international law. We must also remember that before a State can be said to have acquired international personality its independence must receive recognition at the hands of other sovereign States of international law. It is true that the right to be treated as a State does not depend on recognition, but recognition is conclusive evidence that the status has been acquired. In the case of a federal State the

recognition of the constituent units by other Powers would be out of question, since such recognition, without the consent of the federation, would amount to a denial of the authority of the federal State.

The exclusive competence of the central authority in a federal State embraces all rights and obligations of an international personality. One of the primary rights of this character relates to diplomatic relations with foreign Powers. In almost all federal States this right has been exclusively reserved for the central authority. Thus, under the Constitution of the United States of America, no diplomatic rights have been conferred on the constituent units. The provisions of other federal States are of a similar character. This does not, however, mean that under a federal constitution no such power could be conceded to a component State. For instance, under the German Federation of 1871 the constituent units of the Reich were invested with diplomatic rights on a parity with the Reich itself, although such rights were not actually exercised by most of them. Further, Bavaria did not surrender these rights even under the Weimar Constitution of 1919. Another interesting exception is to be found in the Constitution of the Soviet Union. Article 18a of the Constitution, which was introduced in 1944, provides that each federated republic has the right to exchange diplomatic and consular representatives with foreign Powers. The Statute of the 1st February, 1944 has granted to the Supreme Council of each republic the right to establish international relations, the Soviet Union reserving to itself the right to regulate on general lines the relations between the federated republics and foreign States. According to Judge Krylov, this statute proves that the federated republics of the Soviet Union are subjects of international law.¹ Indeed, two of these constituent republics, Ukraine and Bielorussia, have already been recognized by other Powers as international persons and are members of the United Nations Organization. However, the Soviet Federation must be regarded as *sui generis* and resembles more closely the British Commonwealth of Nations rather than a Federation strictly so called. The Indian Constitution presents no exception to the general rule and follows the orthodox pattern. Under the Seventh Schedule of the Constitution, the Union Parliament has exclusive legislative authority in respect of "diplomatic, consular and trade representation",

¹ *Les Notions Principales du Droit des Gens*, Hague Recueil, Vol. 70, p. 459.

and the executive authority in regard to the matter is, therefore, exclusively vested in the Union Government.

Another fundamental right of international persons is the right to declare war and to make peace. Hall has made the following pertinent observation: "As international law is destitute of any judicial or administrative machinery, it leaves States which think themselves aggrieved, and which have exhausted all peaceable methods of obtaining satisfaction, to exact redress for themselves by force. It thus recognizes war as a permitted mode of giving effect to its decisions." (Op. cit., p. 61. See also Fauchille, *Droit International Public*, Vol. II., Sec. 1001.) The constitutional law of every State also recognizes the right of the Head of State to declare war and to make peace, but some of the recent constitutions contain provisions prohibiting recourse to war. For example, Article 9 of the Japanese Constitution declares that "aspiring sincerely to an international peace based on justice and order, the Japanese people for ever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes." The Italian Constitution of 1948 contains a similar provision: "Italy repudiates war as an instrument of conquest and aggression against the liberty of other peoples, and accepts on the condition of reciprocity and equality the necessary limitations on sovereignty and an international organization to ensure peace and justice amongst peoples." Article 51 of the Indian Constitution imposes the obligation on the Republic to "promote international peace and security" and to "encourage settlement of international disputes by arbitration." The Constitution does not, however, contain any renunciation of the right to declare war for the enforcement of international claims. On the contrary, under Article 246, as read with the Union List, the Union Parliament has exclusive power to make laws in regard to "war and peace", and under Article 73 executive power in respect of this item is vested in the Union Government. Apart from this express grant of war powers, the Constitution also confers on the Union plenary, executive and legislative authority in regard to the "defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilization." This may be contrasted with the position under the Australian and Canadian Constitutions. Neither of these constitutions contains any express grant of war powers but restricts the authority of the Federal Government to defence. It has,

therefore, been contended in Australia that "the plenitude of its naval and military power is, apparently, subject to limitation for the purpose for which it must be used. It could not enter upon naval and military enterprises solely with a view to foreign conquest and aggression, its power is to be used for the defence of the Commonwealth and all the several States." (Quick & Garran, *op. cit.*, at p. 564). This view, however, does not take into consideration the prerogative of the Crown at common law to declare war and to make peace. The correct view of the matter is to be found in the following observation made by Griffiths, C. J. in *Farry v. Burnett*, 21 C.L.R. at p. 440: "The word 'defence' of itself includes all acts of such kind as may be done in the United Kingdom, either under the authority of Parliament or under the Royal Prerogative, for the purpose of the defence of the Realm, except in so far as they are prohibited by other provisions of the Constitution. It includes preparation for war in time of peace and any such action in time of war as may conduce to the successful prosecution of the war and defeat of the enemy."

It has already been noticed that under the Indian Constitution the power to declare war vests exclusively in the Union Government. The constituent States of the Indian Republic do not, therefore, enjoy any authority whatsoever in respect of this matter. This is no doubt generally true of all federal constitutions. There are, however, certain federal constitutions which permit member States to defend themselves against external aggression when there is not sufficient time to seek the intervention of the federal government. But in all such cases it is the federation and the federation alone which has not only the right but is also under the obligation to intervene in the event of a dispute between a constituent State and a foreign Power. For example, Article I, Section X of the Constitution of the United States provides that no State shall, without the consent of the Federal Congress, engage in war unless actually invaded, or in such imminent danger as will not admit of delay. In other words, the States have the right to engage in war in the event of the contingencies specified in the Article. Article 112 of the Mexican Constitution contains a similar provision.

Another right of outstanding importance which international law concedes to all sovereign States is the right to conclude treaties with foreign Powers. In view of the fact that under a federal constitution it is the federation and the federation alone which enjoys international status, the right must necessarily fall within the competence of the

central government. Many federal constitutions expressly embody this general principle. The Indian Constitution presents no exception to this rule. The legislative authority of the Union Parliament embraces Item 14 of the Union List which reads as follows: "Entering into treaties and agreements with foreign countries and implementing all treaties, agreements and conventions with foreign countries." The conclusion of treaties, therefore, falls within the competence of the executive authority of the Union under Article 73 of the Constitution. Consequently, the constituent States cannot under any circumstances enter into treaties with foreign Powers, unless expressly authorized by the Union Parliament. This is not, however, exactly the position under other federal constitutions. For instance, in the United States of America, the Constitution recognizes the right of the States to conclude treaties with foreign Powers, but this right can only be exercised with the consent of the Federal Congress. Under the Swiss Constitution, the Cantons are competent to enter into reciprocal arrangements with foreign States in relation to matters of internal administration, but the arrangements which the Cantons are empowered to accept must not be contrary to the treaties of the Confederation or the rights of other Cantons or to the provisions of the Constitution or of federal laws. A similar provision is to be found in the Constitution of the West German Republic. Clauses 1 and 3 of Article 32 of the Constitution provide that each constituent unit of the West German Republic has, within the limits of its legislative competence, the right to conclude agreements with foreign States which may have political consequences both for itself and the federation, but in order to avoid agreements prejudicial to federal interests, previous authorization of the Republic is necessary. The Federal Constitutional Court has, however, made it clear that apart from this right, the *Laender* are not competent to participate in external affairs, nor can they have their own independent foreign policy. (See BverfG., 1953. II., p. 378). It is evident that as regards this matter, the constituent States of the Indian Republic have been reduced to the status of a province of a unitary State: evidence of the highly centralized character of the Indian Union. It should, however, be remembered that the position is exactly the same under the Constitutions of Mexico, Brazil, Argentina and Austria. Similarly, the constituent units of the Dominions of Australia and Canada do not enjoy any treaty-making power.

An interesting question which arises in this connection is: whether

the government of a federal State is constitutionally competent to legislate in respect of matters which fall entirely within the exclusive sphere of the component States for the purpose of implementing treaties? The question was pointedly raised in the Dominion of Canada and has been finally settled by three important decisions of the Judicial Committee. The principles established by these decisions are as follows. In the first place, where the Dominion of Canada has incurred obligations under treaties concluded by the British Commonwealth of Nations or the British Empire, the Dominion Parliament is competent to legislate for the purpose of implementing treaties even in respect of matters which fall within the exclusive competence of the Provinces. This is covered by Section 132 of the British North America Act. [*In re Control of Aeronautics* (1932) A.C. 54]. Secondly, where the Dominion has concluded a treaty not as part of the Commonwealth but separately, the authority of the Dominion Parliament extends to matters which do not fall either within the express powers of the Dominions or of the Provinces. Such matters can be dealt with by the Dominion Parliament under its residuary powers. [*In re Regulation and Control of Radio Communication*, (1932) A.C. 304]. Thirdly, the Dominion Parliament has no authority to legislate for the purpose of implementing a treaty which refers to a matter falling exclusively within the legislative powers of the Provinces. The point was specifically decided by the Judicial Committee in *Attorney-General for Canada v. Attorney-General for Ontario & others*, (1937) A.C. 326. Lord Atkin, in delivering the judgement of the Board, observed: "it must be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers are distributed and if, in the exercise of her new functions, derived from her new international status, Canada incurs obligations, they must so far as legislation be concerned, when they deal with provincial classes of subjects, be dealt with by the totality of powers, in other words, by co-operation between the Dominion and the Provinces." There is no provision in the Australian Constitution corresponding to Section 132 of the British North America Act; nor does the Federal Parliament of Australia enjoy residuary powers under the Constitution. It has, however, been contended that the Commonwealth Parliament could legislate for implementing treaty obligations in respect of matters falling within the exclusive competence of the Australian

States. (Wynes, *op. cit.*, p. 201). This argument is based on the grant of legislative power in respect of "external affairs". It does not, however, appear to be well-founded. The careful specification of powers conceded to the Commonwealth becomes meaningless if these powers could be so extended as to intrude upon the constitutional competence of the States, and this is fully borne out by the judgement of the Judicial Committee in the Canadian case referred to above. The point has, however, been settled by the judgement of the High Court in *The King v. Burgess*, 55 C.L.R. 508. In that case the question arose with regard to the Air Navigation Act, 1920 enacted by the Commonwealth Parliament to give effect to the International Convention for the Regulation of Aerial Navigation. Section 4 of the Act authorized the Governor-General, *inter alia*, to make regulations for the purpose of carrying out and giving effect to the Convention. The High Court laid down three propositions. In the first place, so much of Section 4 of the Act as empowered the Governor-General to make regulations for carrying out and giving effect to the Convention was a valid exercise of the power conferred by the Constitution in respect of external affairs. Secondly, the Commonwealth Parliament has no control over civil aviation and, therefore, so much of Section 4 as purported to authorize the making of regulations for this purpose was invalid. Thirdly, some of the regulations were not regulations for carrying out or giving effect to the Convention, and were therefore, invalid. Latham, C.J. further clarified the position as follows: "There are, however, limitations upon the power of the Commonwealth to make and give effect to international agreements. The Executive Government of the Commonwealth and the Parliament of the Commonwealth are alike bound by the Constitution and the Constitution cannot be indirectly amended by means of an international agreement made by the Executive Government and subsequently adopted by Parliament."

No difficulty arises where the Constitution expressly or by implication confers power on the federal government to entrench upon the sphere of competence of the States for implementing an obligation arising under a treaty, as is the case under the Constitution of the United States. The Indian Constitution follows the American pattern and expressly declares that the Union Parliament "has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any

international conference, association or other body." It is, therefore, obvious that by virtue of this provision embodied in Article 253 of the Constitution the Union Parliament is competent to legislate in respect of matters falling within the exclusive authority of the States for the purpose of implementing a treaty or convention.

Exclusive Responsibility of the Union in International Law.

Another logical consequence of the fact that a federal State is an international unit is that in the event of a dispute with a foreign Power in respect of an injurious act or delinquency on the part of a component unit, it is the federal government alone which is held responsible. The foreign Power has no authority to seek redress from a constituent unit; nor can the federal State divest itself of its obligations as a member of the community of nations. There are several cases in which this point has been made clear. It has been held that it is the federal government which alone is responsible for the action of the authorities of a constituent State, even if such action was within the exclusive constitutional competence of the unit and could not, therefore, be interfered with by the federal government. The argument that in such a case the federal government has no authority to intervene has not been accepted on the ground that according to international law it is the federation which alone has juridical personality, and international law does not take cognisance of the internal arrangements of a State. This was the opinion held by the arbitrators in the dispute between Columbia and the United States of America. In that case Columbia, which was then a federal State, was arraigned for the acts of the constituent unit of Panama. The arbitrators held that the federal State of Columbia was responsible, and observed as follows: "It may seem at first sight unfair to make the federal power, and through it the tax-payers of the country responsible, morally and pecuniarily, for events over which they have no control, and which they probably disapprove of or disavow, but the injustice disappears when this inconvenience is found to be inseparable from the federal system. If a nation deliberately adopts the form of administering its public affairs, it does so with the full knowledge of the consequences it entails." This position of the law was not always accepted by the United States of America where cases of this kind have often arisen in view of the federal character of its constitution. Thus, in 1878 a claim was made against the United States for indemnity for the killing of a British subject in the State of New Mexico. It was contended on behalf of the British Government that

as no remedy lay under the law of New Mexico to recover damages for the unlawful killing, it was necessary to look to the United States for compensation. The American Secretary of State contended on behalf of his Government that "the laws of the various States and territories of the Union for the punishment of crimes committed within the several jurisdictions are administered and executed in these several independent jurisdictions by the respective local tribunals and officers free from any control or interference of the Federal Government." On this ground it was argued that the facts did not constitute a just foundation for a claim against the Government of the United States. In the end no compensation was paid by the United States, and the case may, therefore, be cited as embodying the principle that the plea that a federal government is not competent to interfere under its constitutional law is a bar to any claim arising under international law. (*Turnstall's Case*)¹. In 1879 the Government of the United States adopted a different attitude when they made a similar claim against the Government of Venezuela. They contended: "As sovereign States, both the United States and Venezuela have the undoubted right to be satisfied, each for itself, that no wrong to its citizens by the other passes unredressed and neither Sovereign can rightly be expected to recognise validity as attaching to the municipal enactments of the one which may assume to bar the exercise of the rights given by international law to the other." Ultimately the Government of Venezuela offered to pay compensation, and this offer was accepted by the United States. The principle was finally settled so far as the United States was concerned in 1891 when a claim was made by the Italian Government against the United States on behalf of a number of Italian subjects who were lynched at New Orleans in the State of Louisiana. The Government of the United States accepted their responsibility and due compensation was paid by them to the Italian Government. This view of the law was also accepted by the Government of the United States when a claim was made by the British Government in 1895 on behalf of a British subject who was shot and wounded by a body of armed men without provocation or warning.² The principle is now well established that "a federal State represents internationally the States of which it is constituted and it cannot, therefore, deny its responsibility in respect of acts committed within the territory of these States on the

¹ Moore, *Digest of International Law*, Vol. VI., pp. 662-663.

ground that its constitution does not confer on it any power of control over the constituent States and, therefore, it cannot compel them to discharge their obligations."¹ It is, therefore, clear that whatever be the provisions of the Indian Constitution in regard to the distribution of power between the Union Government and the States, it is the Union which will be held responsible in all cases of injurious acts or international delinquencies on the part of a constituent unit. It would, however, appear that this responsibility does not extend to contractual obligations. It has been held that a federal government is responsible for the contractual obligations of its member States only in exceptional circumstances. "In the cases in which a federal government has been held liable upon the contracts of a State, there has been (1) an immediate connection of the federal government with the contract as a participant therein, or (2) an assumption thereof or of liability therefor, or (3) a connection therewith as beneficiary, whether in the inception or as a beneficiary of the performance, in whole or in part, or (4) some direct federal interest therein."²

Constitutional Directives on International Policy. The Indian Constitution contains not only an elaborate bill of rights but also a statement of some of the basic principles of governance; and these the Constitution describes as "directive principles of State policy". Although the wording of these Articles is in an imperative and mandatory form, the Constitution makes it clear that they are not enforceable at law; indeed some of them are of such a character that they could not be legally enforced at all. On the other hand, it is abundantly clear that the Government of the Republic is politically responsible for carrying out these principles into practice. These provisions deal not only with questions of internal policy but also lay down the principles which should govern the foreign policy of the Republic. Article 51 of the Constitution, which is a verbatim reproduction of the Havana Declaration of 1939, deals with (a) the objectives of international policy, (b) the conduct of international relations, and (c) the settlement of international disputes. As regards the objectives, the Article prescribes that the Republic "shall endeavour to promote international peace and security" and "to maintain just and honourable relations between nations". As regards the conduct of external relations, the Article lays down that in its dealings with other Powers the Republic shall endeavour to "foster

¹ Fauchille, *op. cit.*, Section 298.

respect for international law and treaty obligations." This is the only express recognition of international law by the Constitution. The question, therefore, arises: what is the precise relation between the internal law of the Republic and international law? Two different systems have been adopted in the various existing constitutions. The first is the system of the primacy of international law. For instance, the French Constitution of 1947 laid down that "the Republic of France, faithful to its traditions, shall conform to the rules of public international law." The Italian Constitution of 1948 also declares that "the Italian legal order shall conform to the generally recognised rules of international law." It is, therefore, evident that under both these constitutions the rules of internal law are subject to the principles of international law; in other words, a rule of internal law is invalid if it is in conflict with a rule of international law. The second is the system of the primacy of internal law. Under this system, the generally accepted rules of international law are deemed to be part of the law of the land, but in a conflict between rules of internal law and those of international law, the former must prevail, although the courts interpreting a municipal law will always seek to adopt such construction as will not bring it into conflict with international law.¹ The rule of the common law is that "legislation of the Imperial Parliament, even in contravention of generally acknowledged principles of international law, is binding upon and must be enforced by the Courts." [*Croft v. Dunphy*, (1933) A.C. 156]. There is no specific provision in the Indian Constitution dealing with this matter, and it may, therefore, be legitimately contended that the rule of the common law will apply in accordance with the general rule that the principles of the common law form part of the *corpus juris* of India in the absence of express statutory provisions to the contrary. As regards the question of settlement of international disputes, Article 41 specifically provides that the Republic shall endeavour to encourage the settlement of international disputes by arbitration. The term "arbitration" in this case must be interpreted to mean not only arbitration but other methods of peaceful settlement such as good offices and mediation. It must also be understood that this provision does not exclude the right of the Republic as an international person to resort to war as a means of enforcing its claims.

¹ *West Rand Central Gold Mining Co. v. R.*, L.R. (1905) 2 K.B. 391.

See also Pitt Cobbett, *Leading Cases on International Law*, Vol. 1, pp. 15 et seq.

The Indian Republic and Commonwealth. The British Commonwealth of Nations comprises today two different categories of members. The original members of the Commonwealth, Australia, Canada, New Zealand and South Africa, belong to the first category. They have now been joined by the new Dominions of Ceylon and Ghana.¹ The second group consists of the new States of India and Pakistan. Although as members of the Commonwealth the States belonging to the two categories are equal in status, their constitutional position is not exactly similar. The political position of the first category of members vis-à-vis the United Kingdom was settled by the Balfour Declaration of 1926 which stated that "they are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, although united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations." This declaration did not, however, change the legal position of the Dominions. It was to remove the legal inequalities which continued to exist that the Statute of Westminster was enacted in 1931. The preamble to the Statute expressly stated that the law was being enacted for ratifying, confirming and establishing some of the declarations and resolutions of the Imperial Conferences. The Statute was, therefore, giving legal expression to the new concept of Dominion which had been embodied in the Balfour Declaration. The changes which were thus introduced in regard to the position of the Dominions marked the final stage in their evolution from the status of Colonies to that of sovereign States. In the first place, the Statute provided that no law and no provision of any law made after the commencement of the Statute by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England or to the provision of any existing or future Act of the Parliament of the United Kingdom. It also authorized the Parliament of a Dominion to repeal or amend any such Act in so far as it is part of the law of the Dominion. The legislative authority of the Parliament of a Dominion was also enlarged to include the power to make laws having extra-territorial operation. Secondly, the Statute abridged the authority of the Parliament of the United Kingdom to enact laws for a Dominion. Section 4 of the Statute

¹ The Dominion of Ghana will shortly become a republic and then belong to the second group of members of the Commonwealth.

expressly provided that no Act of the Parliament of the United Kingdom shall extend or be deemed to extend to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that the Dominion had requested, and consented to, the enactment.

The precise effect of the Statute on the authority of the Dominion Legislatures has been the subject of a great deal of argument. On the one hand, it has been contended that the *prima facie* meaning of Section 4 of the Statute is that in future a statute of the Parliament of the United Kingdom is to have no validity in a Dominion unless it contains a declaration that the Dominion concerned has agreed to its enactment. It has also been asserted that the Statute frees a Dominion Parliament from the control of Imperial Acts already in force and also enables it to nullify any future Act that the Imperial Parliament may attempt to apply to a Dominion. It has further been urged that Section 4 of the Statute shows an intention on the part of the Imperial Parliament to limit for the future its legal power to legislate for a Dominion. This view, it has been pointed out, is supported by the preamble to the Statute.¹ This interpretation of the Statute has also been adopted by the Supreme Court of South Africa in *Ndlwana v. Hofmeyer* (1937) A.D. 229. In that case the question was whether an Act dealing with the voting rights of the Africans which was passed at a joint sitting of both Houses of the South African Parliament was *ultra vires* in so far as it did not fall within the class of enactments for which, under the South African Constitution Act, this procedure was appropriate. It was argued in that case that the Statute of Westminster by removing the fetters upon the powers of the Union Parliament did not confer sovereignty and that the power conferred rested upon a statute of the Parliament of the United Kingdom and could, therefore, be withdrawn by a similar statute. The Supreme Court of South Africa, however, held otherwise. The Court said: "We cannot take this argument seriously. Freedom once conferred cannot be revoked." The same view was taken by Danckwerts, J. in *In re Brassey's Settlement: Barclay's Bank Ltd. v. Brassey*, (1955) 1 W.L.R. 192. Dealing with the question of the status of Canada, the learned Judge observed: "It seems to me, they are equal sovereign States and not dependencies and, of course, not subordinate to the Parliament of the United Kingdom. The Statute of Westminster was giving effect to that conception and I have to give effect to it also."

¹ Harrison, 17 *Australian Law Journal*, pp. 282 and 341.

On the other hand, the strict view of English law was thus set forth by Lord Sankey in *British Coal Corporation v. The King*, (1935) A.C. 500: "It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired: indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard Section 4 of the Statute." Moreover, it is necessary to point out that Section 4 of the Statute of Westminster did not terminate the authority of the Parliament of the United Kingdom to legislate for a Dominion. On the contrary, it expressly preserves the right to do so with the consent of a Dominion. It is, therefore, evident that the constitutional relations between the Parliament of the United Kingdom and the Dominions continue to subsist. This was acknowledged by the High Court of Australia in *The King v. Sharkey*, 23 A.L.J. 435. In that case the validity of Section 24A of the Crimes Act, 1914-46, was challenged on the ground that it was *ultra vires* the Constitution of the Commonwealth. While rejecting the plea, Latham, C. J. observed as follows: "The Government and the Constitution of the United Kingdom and the Houses of Parliament of the United Kingdom were also part of the legal and political constitution of the Commonwealth (of Australia) and the preservation of their integrity and authority was part of the protection and maintenance of the Commonwealth itself." Dixon, J. thus stated the position: "The constitutional relations of Australia as part of the British Commonwealth with the established Government of the United Kingdom were such that it might be considered that a law to safeguard the Constitution and Parliament of the United Kingdom from disaffection was a law upon a matter incidental to the protection and maintenance of the Australian Federal polity itself."

It should, however, be remembered that apart from the constitutional nexus between these members of the Commonwealth and the United Kingdom, there is a field of relations between them which must necessarily be governed by rules of international law. The Dominions are today sovereign States in their own right and as such are members of the United Nations Organization. It follows, therefore, as a necessary corollary that their relations with each other and with the United Kingdom must to a large extent be governed by the principles of international law. Continental jurists have, therefore, argued that the British Commonwealth of Nations must be classed as a "personal union". This interpretation is not, however, correct. In

a "personal union", as it is known to international law, there does not exist any constitutional nexus between the members of such a union, apart from the fact that they have a common sovereign. Others have described the British Commonwealth of Nations, as it stood before 1949, as a form of confederation. This description is equally inappropriate. In a confederation, strictly so-called, there must be a common legislature or a common organ competent to formulate legislative policies which are binding on the members of the confederation. The British Commonwealth of Nations does not, however, possess any such common organ, for the Parliament of the United Kingdom is not a common legislature of the Commonwealth, although it may claim to exercise, at least in theory, an over-all authority; nor is there to be found any detailed constitutional organization which is usually associated with a confederation.

The following conclusions may now be drawn regarding the constitutional position of the first category of members of the Commonwealth. In the first place, in theory, if not in actual practice, every such member is within the legislative authority of the Imperial Parliament, although no law of the British Parliament can at present extend to any such member as part of the law of that Dominion except at the request and with the consent of that Dominion. This position has not, however, remained static and changes have been brought about by statutory enactments. For instance, in South Africa the Status of the Union Act, 1934, has terminated the legislative authority of the British Parliament and specifically prescribed "that the Parliament of the Union shall be the sovereign legislative power in and over the Union; and that a law of the British Parliament shall not be applicable in the Union unless extended thereto by an Act of the Parliament of the Union." This provision is, however, at variance with Section 4 of the Statute of Westminster and its validity from the point of view of the Commonwealth Constitutional Law may well be doubted. Secondly, every Dominion is in theory a dominion of the Crown, and the executive authority is still expressly vested in the Crown to be exercised by it or its representative. Here again the position has been modified by a statute of the South African Parliament. The Status of the Union Act, 1934, has not affected the provision of the Constitution Act that the executive government of the Union is vested in the Crown, but has expressly laid down that the Crown must act on the advice of its South African Ministers. It has also deleted the provision of the South Africa Act, 1909, regarding

the reservation of Bills for the assent of the Crown. Thirdly, the Dominions as parts of Her Majesty's realm, owe allegiance to the Crown, and their citizens are as such British subjects and also owe allegiance to the Crown.

The position of the second group of members, to which India and Pakistan belong, is entirely different. For them the Commonwealth is no longer a constitutional organization but an international association, because there is no constitutional nexus between them and the Crown of England; nor is there any constitutional link between them and the members of the first category. They do not owe allegiance to the Crown and, as the Declaration of 1949 makes it clear, their membership of the Commonwealth is based upon "free association" and not upon allegiance to the Crown, although they accept the Crown as the Head of the Commonwealth. The result is that the territories of these members of the Commonwealth do not form part of Her Majesty's dominions and the Parliament of the United Kingdom has neither in theory nor in fact any legislative authority over them. Speaking of India, Sir Ivor Jennings has argued that "it is, however, equally plain that the territories which were formerly parts of British India remain 'Dominions of the Crown' though this appears to have no consequences whatever in the law of India."¹ It is difficult to accept this proposition. Under the Indian Independence Act, 1947, the Parliament of the United Kingdom has clearly and specifically renounced all rights in and over the two States of Pakistan and India. As we have already seen, the Indian Independence Act did, however, continue the constitutional link between the Government of India and the Crown but this constitutional nexus has also disappeared under the Indian Constitution. The true position, therefore, would appear to be that as there is no constitutional relationship between the Republic of India and the Crown, India has ceased to be part of Her Majesty's dominions. Sir Ivor bases his argument on the fact that Article 395 of the Indian Constitution has expressly retained the Abolition of Privy Council Jurisdiction Act, 1949, as valid and subsisting and contends that this provision shows that but for that Act, the Privy Council would be at liberty to grant leave to appeal from any court in India or possibly British India. It is submitted that this interpretation is erroneous. It completely ignores the very important fact that the Act not only abolished the jurisdiction of the

¹ *Constitutional Laws of the Commonwealth*, Oxford, 1952, p. 148.

Privy Council with effect from the 10th October, 1949 but also continued the jurisdiction in certain pending cases. Section 4 of the Act expressly provided that the abolition of the jurisdiction of the Privy Council under Section 2 shall not affect the jurisdiction of His Majesty in Council to dispose of (a) any Indian appeal or petition which has not been determined by an Order in Council; or (b) any Indian appeal or petition on which the Judicial Committee has, after hearing the parties, reserved judgement or order; or (c) any Indian appeal which has been entered before the 10th October, 1949 in the list of business of the Judicial Committee for the Michaelmas sittings of 1949 and which has not been directed to be removed therefrom by or under the authority of the Judicial Committee; or (d) any Indian petition which has been lodged before the 10th October, 1949 in the registry of the Privy Council. It is, therefore, clear that if the Act had been repealed by the Constitution, it would have affected the jurisdiction of the Privy Council in respect of these pending cases. This is the main reason why Article 395 of the Constitution did not repeal the Abolition of Privy Council Jurisdiction Act, 1949. Moreover, Section 8 of the Act provides that "any order of His Majesty in Council made on an Indian appeal or petition, whether before, on or after the appointed day, shall for all purposes have effect, not only as an order of His Majesty in Council, but also as if it were an order or decree made by the Federal Court in the exercise of the jurisdiction conferred by this Act." In other words, by preserving this provision of the Act, Article 395 continues the binding force of the judgements of the Privy Council delivered before the commencement of the Constitution in so far as the High Courts and subordinate courts in India are concerned. The position would have been different if the entire Act had been repealed by the Constitution. It is, therefore, evident that it is not correct to argue that India continues to be part of Her Majesty's dominions merely because the statute abolishing appeals to the Privy Council has not been repealed by the Indian Constitution. Nor can it be asserted that if the statutory provisions had not been continued, the Privy Council would have the right to hear and decide appeals from any court in India. It should also be pointed out that if India had continued to be part of Her Majesty's dominions it would not have been necessary for the British Parliament to enact the India (Consequential Provision) Act, 1949 to provide that notwithstanding the republican constitution of India, any existing law of the United Kingdom shall have the same operation in the

United Kingdom in relation to India as it would have if India had not adopted the republican form of government. It is because of this statutory provision that the High Court of England has held that the Fugitive Offenders Act, 1881, which is applicable only to Her Majesty's dominions, is also applicable to India notwithstanding the fact that she has terminated her constitutional relationship with the Crown. [*In re Government of India and Mubarik Ali*, (1952) 1 All. E.R. 1060].

Another direct consequence of the termination of the constitutional relationship between India and the Crown is that the citizens of India do not owe allegiance to the British Crown and are not British subjects. But the India (Consequential Provision) Act, 1949 has preserved the status and rights which the citizens of India enjoyed in the United Kingdom before she adopted the republican form of government. As we have already seen, under this enactment, the existing laws of the United Kingdom continue to apply in the United Kingdom to citizens of India despite the change in the form of government. Therefore, Indian citizens, although not British subjects, remain Commonwealth citizens and are in the same position as citizens of Australia or Canada when in the United Kingdom. They have the same right to enter and leave the United Kingdom as the citizens of the Dominions and are free from the restrictions applicable to the citizens of foreign States.

On the other hand, the Republic of India has expressly recognized the special relationship which exists between it and other members of the Commonwealth. Proviso to Clause (3) of Article 367 authorizes the President of the Republic to declare, subject to the provisions of any law made by the Union Parliament, any State not to be a foreign State for such purposes as may be specified in the order of the President. Under Article 392, this power was exercisable by the Governor-General before the commencement of the Constitution. Accordingly, the Constitution (Declaration as to Foreign States) Order, 1950 was promulgated by the Governor-General declaring that "subject to the provisions of any law made by Parliament, every country within the Commonwealth is hereby declared not to be a foreign State for the purposes of this Constitution." Thus, in recognition of the ties of the Commonwealth relations, a distinction has been drawn in law between the member States of the Commonwealth and other foreign States. It should, however, be noted that the distinction established by this Order is not for all purposes but only for "purposes of this

Constitution". Dealing with the question of the validity of Section 3, Preventive Detention Act, 1950, the Supreme Court has thus stated the position in *Jagan Nath Sathu v. Union of India*, A.I.R. (1960) S.C. 625: "Article 367 (3) itself states that for the purposes of the Indian Constitution 'Foreign State' means any State other than India but the President, and before the commencement of the Constitution the Governor-General of India under Article 392 (3), may by order declare any State not to be a Foreign State for such purposes as may be specified in the Order. In the Order the Governor-General declared that every country within the Commonwealth was not a Foreign State for the purposes of the Constitution. In the Constitution of India there are various Articles in which the expression 'Foreign State' appears, e.g., Art. 18 (2), (3), (4), Art. 19 (2), Art. 102 (1) (d) and Art. 191 (1) (d). It is clear, therefore, that under the Order for the purposes of these Articles or any other Article where the expression 'Foreign State' appears, that expression would not cover a country within the Commonwealth unless Parliament enacted otherwise. The Order cannot be brought into aid for the purposes of construing the expression 'foreign affairs' appearing in Item 9 of List I of the Seventh Schedule and the expression 'foreign affairs' in Section 3 of the Act. These expressions must be construed in the ordinary way giving the words the ordinary meaning. We have no doubt that Pakistan is a foreign power." The differentiation has, however, been observed in other statutory enactments. For instance, Section 11 of the Indian Citizenship Act, 1955 expressly provides that "every person who is a citizen of a Commonwealth country specified in the First Schedule shall, by virtue of that citizenship, have the status of a Commonwealth citizen in India." Section 12 authorizes the Union Government to "make provisions on a basis of reciprocity for the conferment of all or any of the rights of a citizen of India on the citizens of any country specified in the First Schedule." The Act also enables a Commonwealth citizen to become a citizen of India by registration, whereas the citizens of other foreign States can acquire Indian citizenship only by naturalization.

Finally, although the Indian Constitution has severed all bonds of constitutional relationship which existed between India and Her Majesty's dominions, there still exists the bond of the common law which forms an integral part of the *corpus juris* of India. Article 225 of the Constitution expressly provides that the law administered in any existing High Court shall be the same as immediately before the

commencement of the Constitution. Hence it has been held that a decision of the Privy Council is binding upon the High Courts until the Supreme Court rules to the contrary. [*Radharani v. Sitar*, (1952) C.W.N. 127]. Moreover, as we have already seen, under Section 8 of the Abolition of Privy Council Jurisdiction Act, 1949, the judgements of the Privy Council delivered before the commencement of the Constitution are binding on the High Courts and subordinate courts in India. It is true that a Division Bench of the Calcutta High Court has held that under this provision it is only the "order" of Her Majesty in Council which is binding on the courts in India and not the reasons given in the judgement. [*Corporation of Calcutta v. Director of Rationing*, A.I.R. (1955) Cal. 282]. This decision, however, ignores the effect of Article 225 of the Constitution. It is true that neither Article 225 nor Section 8 of the Abolition of Privy Council Jurisdiction Act, 1949, is binding on the Supreme Court of India. Nevertheless, it is evident that the decision of English courts on questions of the common law must receive paramount consideration even in the judgements of the Supreme Court.

APPENDIX I

Indian Independence Act, 1947

AN ACT to make provision for the setting up in India of two independent Dominions, to substitute other provisions for certain provisions of the Government of India Act, 1935, which apply outside those Dominions, and to provide for other matters consequential on or connected with the setting up of those Dominions.

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. (1) As from the fifteenth of August, nineteen hundred and forty-seven, two independent Dominions shall be set up in India, to be known respectively as India and Pakistan.

(2) The said Dominions are hereafter in this Act referred to as "the new Dominions," and the said fifteenth day of August is hereafter in this Act referred to as "the appointed day".

2. (1) Subject to the provisions of subsections (3) and (4) of this section, the territories of India shall be the territories under the sovereignty of His Majesty which, immediately before the appointed day, were included in British India except the territories which, under subsection (2) of this section, are to be the territories of Pakistan.

(2) Subject to the provisions of subsections (3) and (4) of this section, the territories of Pakistan shall be

- (a) the territories which, on the appointed day, are included in the Provinces of East Bengal and West Punjab, as constituted under the two following sections;
- (b) the territories which, at the date of the passing of this Act, are included in the Province of Sind and the Chief Commissioner's Province of British Baluchistan; and
- (c) if, whether before or after the passing of this Act but before the appointed day, the Governor-General declares that the majority of the valid votes cast in the referendum which, at the date of the passing of this Act, is being or has recently been held in that behalf under his authority in the North-West Frontier Province are in favour of representatives of that province taking part in the Constituent Assembly of Pakistan, the territories which, at the date of the passing of this Act, are included in that Province.

(3) Nothing in this section shall prevent any area being at any time included in or excluded from either of the New Dominions, so, however, that

(a) no area not forming part of the territories specified in subsection (1) or, as the case may be, subsection (2), of this section shall be included in either Dominion without the consent of that Dominion; and

(b) no area which forms part of the territories specified in the said subsection (1) or, as the case may be, the said subsection (2), or which has after the appointed day been included in either Dominion, shall be excluded from that Dominion without the consent of that Dominion.

(4) Without prejudice to the generality of the provisions of subsection (3) of this section, nothing in this section shall be construed as preventing the accession of Indian States to either of the new Dominions.

3. (1) As from the appointed day

Bengal and Assam (a) the Province of Bengal, as constituted under the Government of India Act, 1935, shall cease to exist; and

(b) there shall be constituted in lieu thereof two new Provinces, to be known respectively as East Bengal and West Bengal.

(2) If, whether before or after the passing of this Act, but before the appointed day, the Governor-General declares that the majority of the valid votes cast in the referendum which, at the date of the passing of this Act, is being or has recently been held in that behalf under his authority in the District of Sylhet are in favour of that District forming part of the new Province of East Bengal, then, as from that day, a part of the Province of Assam shall, in accordance with the provisions of subsection (3) of this section, form part of the new Province of East Bengal.

(3) The boundaries of the new Provinces aforesaid and, in the event mentioned in subsection (2) of this section, the boundaries after the appointed day of the Province of Assam, shall be such as may be determined, whether before or after the appointed day, by the award of a boundary commission appointed or to be appointed by the Governor-General in that behalf, but until the boundaries are so determined—

(a) the Bengal Districts specified in the First Schedule to this Act, together with, in the event mentioned in subsection (2) of this section, the Assam District of Sylhet, shall be treated as the territories which are to be comprised in the new Province of East Bengal;

(b) the remainder of the territories comprised at the date of the passing of this Act in the Province of Bengal shall be treated as the territories which are to be comprised in the new Province of West Bengal: and

(c) in the event mentioned in subsection (2) of this section, the District of Sylhet shall be excluded from the Province of Assam.

(4) In this section, the expression "award" means, in relation to a boundary commission, the decisions of the chairman of that commission contained in his report to the Governor-General at the conclusion of the commission's proceedings.

4. (1) As from the appointed day

The (a) the Province of the Punjab as constituted under the Govern-
Punjab ment of India Act, 1935, shall cease to exist; and

(b) there shall be constituted two new Provinces, to be known respectively as West Punjab and East Punjab.

(2) The boundaries of the said new Provinces shall be such as may be determined, whether before or after the appointed day, by the award of a boundary commission appointed or to be appointed by the Governor-General in that behalf, but until the boundaries are so determined—

(a) the Districts specified in the Second Schedule to this Act shall be treated as the territories to be comprised in the new Province of West Punjab; and

(b) the remainder of the territories comprised at the date of the passing of this Act in the Province of the Punjab shall be treated as the territories which are to be comprised in the new Province of East Punjab.

(3) In this section, the expression "award," means, in relation to a boundary commission, the decisions of the chairman of that commission contained in his report to the Governor-General at the conclusion of the commission's proceedings.

5. For each of the new Dominions, there shall be a Governor-General who shall be appointed by His Majesty and shall represent His Majesty for the purposes of the government of the Dominion:

The **Governor-General of** **the new** **Dominions** Provided that, unless and until provision to the contrary is made by a law of the Legislature of either of the new Dominions, the same person may be Governor-General of both the new Dominions.

6. (1) The Legislature of each of the new Dominions shall have full power to make laws for that Dominion, including laws having extra-territorial operation.

Legislation **for the new** **Dominions** (2) No law and no provision of any law made by the Legislature of either of the new Dominions shall be void or inoperative on the grounds that it is repugnant to the law of England, or to the provisions of this or any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Legislature of each Dominion include the power to

repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of the Dominion.

(3) The Governor-General of each of the new Dominions shall have full power to assent in His Majesty's name to any law of the Legislature of that Dominion and so much of any Act as relates to the disallowance of laws by His Majesty or the reservation of laws for the signification of His Majesty's pleasure thereon or the suspension of the operation of laws until the signification of His Majesty's pleasure thereon shall not apply to laws of the Legislature of either of the new Dominions.

(4) No Act of Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to either of the new Dominions as part of the law of that Dominion unless it is extended thereto by a law of the Legislature of the Dominion.

(5) No Order in Council made on or after the appointed day under any Act passed before the appointed day, and no order, rule or other instrument made on or after the appointed day under any such Act by any United Kingdom Minister or other authority, shall extend, or be deemed to extend, to either of the new Dominions as part of the law of that Dominion.

(6) The power referred to in subsection (1) of this section extends to the making of laws limiting for the future the powers of the Legislature of the Dominion.

7. (1) As from the appointed day

Consequences of the setting up of the new Dominions (a) His Majesty's Government in the United Kingdom have no responsibility as respects the government of any of the territories which, immediately before that day, were included in British India.

(b) the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise; and

(c) there lapse also any treaties or agreements in force at the date of the passing of this Act between His Majesty and any persons having authority in the tribal areas, any obligations of His Majesty existing at that date to any such persons or with respect to the tribal areas, and all powers, rights, authority or jurisdiction exercisable at that date by His Majesty in or relation to the tribal areas by treaty, grant, usage, sufferance or otherwise :

Provided that, notwithstanding anything in paragraph (b) or paragraph (c) of this subsection, effect shall, as nearly as may be, continue to be given to the provisions of any such agreement as is therein referred to which relate to customs, transit and communications, posts and telegraphs, or other like matters, until the provisions in question are denounced by the Ruler of the Indian State or person having authority in the tribal areas on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand, or are superseded by subsequent agreements.

(2) The assent of the Parliament of the United Kingdom is hereby given to the omission from the Royal Style and Titles of the words "Indue Imperator" and the words "Emperor of India" and to the issue by His Majesty for that purpose of His Royal Proclamation under the Great Seal of the Realm.

8. (1) In the case of each of the new Dominions, the powers of the Legislature of the Dominion shall, for the purpose of making provision as to the constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly of that Dominion, and references in this Act to the Legislature of the Dominion shall be construed accordingly.

(2) Except in so far as other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion under subsection (1) of this section, each of the new Dominions and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935; and the provisions of that Act, and of the Orders in Council, rules and other instruments made thereunder, shall so far as applicable, and subject to any express provisions of this Act, and with such omissions, additions, adaptations and modifications as may be specified in orders of the Governor-General under the next succeeding section, have effect accordingly:

Provided that

- (a) the said provisions shall apply separately in relation to each of the new Dominions and nothing in this subsection shall be construed as continuing on or after the appointed day any Central Government or Legislature common to both the new Dominions;
- (b) nothing in this subsection shall be construed as continuing in force on or after the appointed day any form of control by His Majesty's Government in the United Kingdom over the affairs of the new Dominions or of any Province or other part thereof;
- (c) so much of the said provisions as requires the Governor-General or any Governor to act in his discretion or exercise his individual judgment as respects any matter shall cease to have effect as from the appointed day;

- (d) as from the appointed day, no Provincial Bill shall be reserved under the Government of India Act, 1935, for the signification of His Majesty's pleasure, and no Provincial Act shall be disallowed by His Majesty thereunder; and
 - (e) the powers of the Federal Legislature or Indian Legislature under that Act, as in force in relation to each Dominion, shall, in the first instance, be exercisable by the Constituent Assembly of the Dominion in addition to the powers exercisable by that Assembly under subsection (1) of this section.
- (3) Any provision of the Government of India Act, 1935, which, as applied to either of the new Dominions by subsection (2) of this section and the orders therein referred to, operates to limit the power of the legislature of that Dominion shall, unless and until other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion in accordance with the provisions of subsection (1) of this section, have the like effect as a law of the Legislature of the Dominion limiting for the future the powers of that Legislature.
9. (1) The Governor-General shall by order make such provision as appears to him to be necessary or expedient
- Orders for bringing this Act into force** (a) for bringing the provisions of this Act into effective operation;
- (b) for dividing between the new Dominions, and between the new Provinces to be constituted under this Act, the powers, rights, property, duties and liabilities of the Governor-General in Council or, as the case may be, of the relevant Provinces which, under this Act, are to cease to exist;
 - (c) for making omissions from, additions to, and adaptations and modifications of, the Government of India Act, 1935, and the orders in Council, rules and other instruments made thereunder, in their application to the separate new Dominions;
 - (d) for removing difficulties arising in connection with the transition to the provisions of this Act;
 - (e) for authorising the carrying on of the business of the Governor-General in Council between the passing of this Act and the appointed day otherwise than in accordance with the provisions in that behalf of the Ninth Schedule to the Government of India Act, 1935;
 - (f) for enabling agreements to be entered into, and other acts done on behalf of either of the new Dominions before the appointed day;
 - (g) for authorising the continued carrying on for the time being on behalf of the new Dominions, or on behalf of any two or more of

the said new Provinces, of services and activities previously carried on on behalf of British India as a whole or on behalf of the former Provinces which those new Provinces represent;

- (h) for regulating the monetary system and any matter pertaining to the Reserve Bank of India; and
- (i) so far as it appears necessary or expedient in connection with any of the matters aforesaid, for varying the constitution, powers or jurisdiction of any legislature, court or other authority in the new Dominions and creating new legislatures, courts or other authorities therein.

(2) The powers conferred by this section on the Governor-General shall, in relation to their respective Provinces, be exercisable also by the Governors of the Provinces which, under this Act, are to cease to exist; and those powers shall, for the purposes of the Government of India Act, 1935, be deemed to be matters as respects which the Governors are, under that Act, to exercise their individual judgement.

(3) This section shall be deemed to have had effect as from the third day of June, nineteen hundred and forty-seven, and any order of the Governor-General or any Governor made on or after that date as to any matter shall have effect accordingly, and any order made under this section may be made so as to be retrospective to any date not earlier than the said third day of June:

Provided that no person shall be deemed to be guilty of an offence by reason of so much of any such order as makes any provision thereof retrospective to any date before the making thereof.

(4) Any order made under this section, whether before or after the appointed day, shall have effect

- (a) up to the appointed day, in British India;
- (b) on and after the appointed day, in the new Dominion or Dominions concerned; and
- (c) outside British India, or, as the case may be, outside the new Dominion or Dominions concerned, to such extent, whether before, on or after the appointed day, as a law of the Legislature of the Dominion or Dominions concerned would have on or after the appointed day,

but shall, in the case of each of the Dominions, be subject to the same powers of repeal and amendment as laws of the Legislature of that Dominion.

(5) No order shall be made under this section, by the Governor of any Province, after the appointed day, or, by the Governor-General, after the thirty-first day of March, nineteen hundred and forty-eight, or such earlier date as may be determined, in the case of either Dominion, by any law of the Legislature of that Dominion.

(6) If it appears that a part of the Province of Assam is, on the appoin-

ted day, to become part of the new Province of East Bengal, the preceding provisions of this section shall have effect as if, under this Act, the Province of Assam was to cease to exist on the appointed day and be reconstituted on that day as a new Province.

10. (1) The provisions of this Act keeping in force provisions of the Secretary of Government of India Act, 1935, shall not continue in States' force the provisions of that Act relating to appointments Services, etc. to the civil services of, and civil posts under, the Crown in India by the Secretary of State, or the provisions of that Act relating to the reservation of posts.

(2) Every person who

(a) having been appointed by the Secretary of State, or Secretary of State in Council, to a civil service of the Crown in India continues on and after the appointed day to serve under the Governments of either of the new Dominions or of any Province or part thereof; or

(b) having been appointed by His Majesty before the appointed day to be a judge of the Federal Court or of any court which is a High Court within the meaning of the Government of India Act, 1935, continues on and after the appointed day to serve as a judge in either of the new Dominions.

shall be entitled to receive from the Governments of the Dominions and Provinces or parts which he is from time to time serving or, as the case may be, which are served by the courts in which he is from time to time a judge, the same conditions of service as respects remuneration, leave and pension, and the same rights as respects disciplinary matters or, as the case may be, as respects the tenure of his office, or rights as similar thereto as changed circumstances may permit, as that person was entitled to immediately before the appointed day.

(3) Nothing in this Act shall be construed as enabling the rights and liabilities of any person with respect to the family pension funds vested in Commissioners under section two hundred and seventy-three of the Government of India Act, 1935, to be governed otherwise than by Orders in Council made (whether before or after the passing of this Act or the appointed day) by His Majesty in Council and rules made (whether before or after the passing of this Act or the appointed day) by a Secretary of State or such other Minister of the Crown as may be designated in that behalf by Order in Council under the Ministers of the Crown (Transfer of Functions) Act, 1946.

11. (1) The orders to be made by the Governor-General under the British Forces preceding provisions of this Act shall make provision for in India the division of the Indian armed forces of His Majesty

between the new Dominions, and for the command and governance of those forces until the division is complete.

(2) As from the appointed day, while any member of His Majesty's forces, other than His Majesty's Indian forces, is attached to or serving with any of His Majesty's Indian forces

(a) he shall, subject to any provision to the contrary made by a law of the Legislature of the Dominion or Dominions concerned or by any order of the Governor-General under the preceding provisions of this Act, have, in relation to the Indian forces in question, the powers of command and punishment appropriate to his rank and functions; but

(b) nothing in any enactment in force at the date of the passing of this Act shall render him subject in any way to the law governing the Indian forces in question.

12. (1) Nothing in this Act affects the jurisdiction or authority of His Majesty's Government in the United Kingdom, or of the Admiralty, the Army Council, or the Air Council or of any other United Kingdom authority, in relation to any of His Majesty's forces which may, on or after the appointed day, be in either of the new Dominions or elsewhere in the territories which, before the appointed day, were included in India, not being Indian forces.

(2) In its application in relation to His Majesty's military forces, other than Indian forces, the Army Act shall have effect on or after the appointed day

(a) as if His Majesty's Indian forces were not included in the expressions "the forces," "His Majesty's forces" and "the regular forces"; and

(b) subject to the further modifications specified in Parts I and II of the Third Schedule to this Act.

(3) Subject to the provisions of subsection (2) of this section, and to any provisions of any law of the Legislature of the Dominion concerned, all civil authorities in the new Dominions, and, subject as aforesaid and subject also to the provisions of the last preceding section, all service authorities in the new Dominions, shall, in those Dominions and in the other territories which were included in India before the appointed day, perform in relation to His Majesty's military forces, not being Indian forces, the same functions as were, before the appointed day, performed by them, or by the authorities corresponding to them, whether by virtue of the Army Act or otherwise, and the matters for which provision is to be made by orders of the Governor-General under the preceding provisions of this Act shall include the facilitating of the withdrawal from the new Dominions and other territories aforesaid of His Majesty's military forces, not being Indian forces.

(4) The provisions of subsections (2) and (3) of this section shall apply

in relation to the air forces of His Majesty, not being Indian air forces, as they apply in relation to His Majesty's military forces, subject, however, to the necessary adaptations, and, in particular, as if

- (a) for the references to the Army Act there were substituted references to the Air Force Act; and
- (b) for the reference to Part II of the Third Schedule to this Act there were substituted a reference to Part III of that Schedule.

13. (1) In the application of the Naval Discipline Act to His Majesty's naval forces, other than Indian naval forces, references to His Majesty's navy and His Majesty's ships shall not, as from the appointed day, include references to His Majesty's Indian navy or the ships thereof.

(2) In the application of the Naval Discipline Act by virtue of any law made in India before the appointed day to Indian naval forces, references to His Majesty's navy and His Majesty's ships shall, as from the appointed day, be deemed to be, and to be only, references to His Majesty's Indian navy and the ships thereof.

(3) In section ninety B of the Naval Discipline Act (which, in certain cases, subjects officers and men of the Royal Navy and Royal Marines to the law and customs of the ships and naval forces of other parts of His Majesty's dominions) the words "or of India" shall be repealed as from the appointed day, wherever those words occur.

14. (1) A Secretary of State, or such other Minister of the Crown as may be designated in that behalf by Order in Council under the **Provisions as to the Secretary of State and the Auditor of Indian Home Accounts** 1946, is hereby authorised to continue for the time being the performance, on behalf of whatever government or governments may be concerned, of functions as to the making of payments and other matters similar to the functions which, up to the appointed day, the Secretary of State was performing on behalf of governments constituted or continued under the Government of India Act, 1935.

(2) The functions referred to in subsection (1) of this section include functions as respects the management of, and the making of payments in respect of, government debt, and any enactments relating to such debt shall have effect accordingly:

Provided that nothing in this subsection shall be construed as continuing in force so much of any enactment as empowers the Secretary of State to contract sterling loans on behalf of any such Government as aforesaid or as applying to the Government of either of the new Dominions the prohibition imposed on the Governor-General in Council by section three hundred and fifteen of the Government of India Act, 1935, as respects the contracting of sterling loans.

(3) As from the appointed day, there shall not be any such advisers of the Secretary of State as are provided for by section two hundred and seventy-eight of the Government of India Act, 1935, and that section, and any provisions of that Act which require the Secretary of State to obtain the concurrence of his advisers, are hereby repealed as from that day.

(4) The Auditor of Indian Home Accounts is hereby authorised to continue for the time being to exercise his functions as respects the accounts of the Secretary of State or any such other Minister of the Crown as is mentioned in subsection (1) of this section, both in respect of activities before, and in respect of activities after, the appointed day, in the same manner, as nearly as may be as he would have done if this Act had not been passed.

13. (1) Notwithstanding anything in this Act, and, in particular, **Legal proceedings** notwithstanding any of the provisions of the last preceding **by and against the** section, any provision of any enactment which, but for **Secretary of State** the passing of this Act, would authorise legal proceedings to be taken, in India or elsewhere, by or against the Secretary of State in respect of any right or liability of India or any part of India shall cease to have effect on the appointed day, and any legal proceedings pending by virtue of any such provision on the appointed day shall, by virtue of this Act, abate on the appointed day, so far as the Secretary of State is concerned.

(2) Subject to the provisions of this subsection, any legal proceedings which, but for the passing of this Act, could have been brought by or against the Secretary of State in respect of any right or liability of India, or any part of India, shall instead be brought

(a) in the case of proceedings in the United Kingdom, by or against the High Commissioner;

(b) in the case of other proceedings, by or against such person as may be designated by order of the Governor-General under the preceding provisions of this Act or otherwise by the law of the new Dominion concerned.

and any legal proceedings by or against the Secretary of State in respect of any such right or liability as aforesaid which are pending immediately before the appointed day shall be continued by or against the High Commissioner or, as the case may be, the person designated as aforesaid:

Provided that, at any time after the appointed day, the right conferred by this subsection to bring or continue proceedings may, whether the proceedings are by, or are against, the High Commissioner or person designated as aforesaid, be withdrawn by a law of the Legislature of either of the new Dominions so far as that Dominion is concerned, and any such law may operate as respects proceedings pending at the date of the passing of the law.

(3) In this section, the expression "the High Commissioner" means,

in relation to each of the new Dominions, any such officer as may for the time being be authorised to perform in the United Kingdom, in relation to that Dominion, functions similar to those performed before the appointed day, in relation to the Governor-General in Council, by the High Commissioner referred to in section three hundred and two of the Government of India Act, 1935; and any legal proceedings which, immediately before the appointed day are the subject of an appeal to His Majesty in Council, or of a petition for special leave to appeal to His Majesty in Council, shall be treated for the purposes of this section as legal proceedings pending in the United Kingdom.

16. (1) Subsections (2) to (4) of section two hundred and eighty-eight of the Government of India Act, 1935 which confer on His Majesty power to make by Order in Council provision for the government of Aden shall cease to have effect and the British Settlement Acts, 1887 and 1945, (which authorise His Majesty to make laws and establish institutions for British Settlements as defined in those Acts) shall apply in relation to Aden as if it were a British Settlement so defined.

(2) Notwithstanding the repeal of the said subsections (2) to (4), the Orders in Council in force thereunder at the date of the passing of this Act shall continue in force, but the said Orders in Council, any other Orders in Council made under the Government of India Act, 1935, in so far as they apply to Aden, and any enactments applied to Aden or amended in relation to Aden by any such Orders in Council as aforesaid, may be repealed, revoked or amended under the powers of the British Settlements Acts, 1887 and 1945.

(3) Unless and until provision to the contrary is made as respects Aden under the powers of the British Settlements Acts, 1887 and 1945, or, as respects the new Dominion in question, by a law of the Legislature of that Dominion, the provisions of the said Orders in Council and enactments relating to appeals from any courts in Aden to any courts which will, after the appointed day, be in either of the new Dominions, shall continue in force in their application both to Aden and to the Dominion in question, and the last mentioned courts shall exercise their jurisdiction accordingly.

17. (1) No court in either of the new Dominions shall, by virtue of the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, have jurisdiction in or in relation to any proceedings for a decree for the dissolution of a marriage, unless those proceedings were instituted before the appointed day but, save as aforesaid and subject to any provision to the contrary which may hereafter be made by any Act of the Parliament of the United Kingdom or by any law of the Legislature of the new Dominion concerned, all courts in the new Dominions shall have the same jurisdiction under the said Acts as they would have had if this Act had not been passed.

(2) Any rules made on or after the appointed day under subsection (4) of section one of the Indian and Colonial Divorce Jurisdiction Act, 1926, for a court in either of the new Dominions shall, instead of being made by the Secretary of State with the concurrence of the Lord Chancellor, be made by such authority as may be determined by the law of the Dominion concerned, and so much of the said subsection and of any rules in force thereunder immediately before the appointed day as require the approval of the Lord Chancellor to the nomination for any purpose of any judges of any such court shall cease to have effect.

(3) The reference in subsection (1) of this section to proceedings for a decree for the dissolution of a marriage include references to proceedings for such a decree of presumption of death and dissolution of a marriage as is authorised by section eight of the Matrimonial Causes Act, 1937.

(4) Nothing in this section affects any court outside the new Dominions, and the power conferred by section two of the Indian and Colonial Divorce Jurisdiction Act, 1926, to apply certain provisions of that Act to other parts of His Majesty's Dominions as they apply to India shall be deemed to be power to apply those provisions as they would have applied to India if this Act had not been passed.

18. (1) In so far as any Act of Parliament, Order in Council, order, **Provisions as** rule, regulation or other instrument passed or made before **to existing** the appointed day operates otherwise than as part of the law **laws etc.** of British India or the new Dominions, references therein to India or British India, however worded and whether by name or not, shall, in so far as the context permits and except so far as Parliament may hereafter otherwise provide, be construed as, or as including, references to the new Dominions, taken together, or taken separately, according as the circumstances and subject matter may require:

Provided that nothing in this subsection shall be construed as continuing in operation any provision in so far as the continuance thereof as adapted by this subsection is inconsistent with any of the provisions of this Act other than this section.

(2) Subject to the provisions of subsection (1) of this section and to any other express provision of this Act, the Orders in Council made under subsection (5) of section three hundred and eleven of the Government of India Act, 1935, for adapting and modifying Acts of Parliament shall, except so far as Parliament may hereafter otherwise provide, continue in force in relation to all Acts in so far as they operate otherwise than as part of the law of British India or the new Dominions.

(3) Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations,

continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf.

(4) It is hereby declared that the Instruments of Instructions issued before the passing of this Act by His Majesty to the Governor-General and the Governors of Provinces lapse as from the appointed day, and nothing in this Act shall be construed as continuing in force any provision of the Government of India Act, 1935, relating to such Instruments of Instructions.

(5) As from the appointed day, so much of any enactment as requires the approval of His Majesty in Council to any rules of court shall not apply to any court in either of the new Dominions.

19. (1) References in this Act to the Governor-General shall, in relation to any order to be made or other act done on or after the appointed day, be construed

Interpretation etc.

(a) where the order or other act concerns one only of the new Dominions, as references to the Governor-General of that Dominion.

(b) where the order or other act concerns both of the new Dominions and the same person is the Governor-General of both those Dominions, as references to that person; and

(c) in any other case, as references to the Governor-Generals of the new Dominions, acting jointly.

(2) References in this Act to the Governor-General shall, in relation to any order to be made or other act done before the appointed day, be construed as references to the Governor-General of India within the meaning of the Government of India Act, 1935, and so much of that or any other Act as requires references to the Governor-General to be construed as references to the Governor-General in Council shall not apply to references to the Governor-General in this Act.

(3) References in this Act to the Constituent Assembly of a Dominion shall be construed as references

(a) in relation to India, to the Constituent Assembly, the first sitting whereof was held on the ninth day of December, nineteen hundred and forty-six, modified—

(i) by the exclusion of the members representing Bengal, the Punjab, Sind and British Baluchistan; and

(ii) should it appear that the North-West Frontier Province will form part of Pakistan, by the exclusion of the members representing that Province; and

(iii) by the inclusion of members representing West Bengal and East Punjab; and

- (iv) should it appear that, on the appointed day, a part of the Province of Assam is to form part of the new Province of East Bengal, by the exclusion of the members theretofore representing the Province of Assam and the inclusion of members chosen to represent the remainder of that Province;
- (b) in relation to Pakistan, to the Assembly set up or about to be set up at the date of the passing of this Act under the authority of the Governor-General as the Constituent Assembly for Pakistan:

Provided that nothing in this subsection shall be construed as affecting the extent to which representatives of the Indian States take part in either of the said Assemblies, or as preventing the filling up of casual vacancies in the said Assemblies, or as preventing the participation in either of the said Assemblies, in accordance with such arrangements as may be made in that behalf, of representatives of the tribal areas on the borders of the Dominion for which that Assembly sits, and the powers of the said Assemblies shall extend and be deemed always to have extended to the making of provision for the matters specified in this proviso.

(4) In this Act, except so far as the context otherwise requires—

references to the Government of India Act, 1935, include references to any enactments amending or supplementing that Act, and, in particular references to the India (Central Government and Legislature) Act, 1946;

"India", where the reference is to a state of affairs existing before the appointed day or which would have existed but for the passing of this Act, has the meaning assigned to it by section three hundred and eleven of the Government of India Act, 1935.

"Indian forces" includes all His Majesty's Indian forces existing before the appointed day and also any forces of either of the new Dominions;

"pension" means, in relation to any person, a pension whether contributory or not of any kind whatsoever payable to or in respect of that person, and includes retired pay so payable, a gratuity so payable and any sum or sums so payable by way of the return, with or without interest thereon or other additions thereto, of subscriptions to a provident fund;

"Province" means a Governor's Province.

"remuneration" includes leave pay, allowances and the cost of any privileges or facilities provided in kind.

(5) Any power conferred by this Act to make any order includes power to revoke or vary any order previously made in the exercise of that power.

20. This Act may be cited as the Indian Independence Act, 1947.

SCHEDULES

FIRST SCHEDULE

BENGAL DISTRICTS PROVISIONALLY INCLUDED IN THE NEW PROVINCE OF EAST BENGAL.

In the Chittagong Division, the districts of Chittagong, Noakhali and Tippera.

In the Dacca Division, the districts of Bakarganj, Dacca, Faridpur and Mymensingh.

In the Presidency Division, the districts of Jessore, Murshidabad and Nadia.

In the Rajshahi Division, the districts of Bogra, Dinajpur, Malda, Pabna, Rajshahi and Rangpur.

SECOND SCHEDULE

DISTRICTS PROVISIONALLY INCLUDED IN THE NEW PROVINCE OF WEST PUNJAB.

In the Lahore Division, the districts of Gujranwala, Gurdaspur, Lahore, Sheikhupura and Sialkot.

In the Rawalpindi Division, the districts of Attock, Gujrat, Jhelum, Mianwali, Rawalpindi and Shalpur.

In the Multan Division, the districts of Dera Ghazi Khan, Jhang, Lyallpur, Montgomery, Multan and Muzaffargarh.

THIRD SCHEDULE

MODIFICATIONS OF ARMY ACT AND AIR FORCE ACT IN RELATION TO BRITISH FORCES.

Part I

Modification of Army Act applicable also to Air Force Act

1. The proviso to section forty-one (which limits the jurisdiction of courts martial) shall not apply to offences committed in either of the new Dominions or in any of the other territories which were included in India before the appointed day.

2. In section forty-three (which relates to complaints), the words "with the approval of the Governor-General of India in Council" shall be omitted.

(3) In subsections (8) and (9) of section fifty-four (which amongst other things, require certain sentences to be confirmed by the Governor-General in Council), the words "India or", the words "by the Governor-General, or, as the case may be" and the words "in India, by the Governor-General, or, if he has been tried" shall be omitted.

(4) In subsection (3) of section seventy-three (which provides for the nomination of officers with power to dispense with courts martial for desertion and fraudulent enlistment) the words "with the approval of the Governor-General" shall be omitted.

5. The powers conferred by subsection (3) of section one hundred and thirty (which provides for the removal of insane persons) shall not be exercised except with the consent of the officer commanding the forces in the new Dominions.

6. In subsection (2) of section one hundred and thirty-two (which relates to rules regulating service prisons and detention barracks) the words "and in India for the Governor-General" and the words "the Governor-General" shall be omitted except as respects rules made before the appointed day.

7. In the cases specified in subsection (1) of section one hundred and thirty-four, inquests shall be held in all cases in accordance with the provisions of subsection (3) of that section.

8. In section one hundred and thirty-six (which relates to deductions from pay), in subsection (1) the words "India or" and the words "being in the case of India a law of the Indian legislature", and the whole of subsection (2), shall be omitted.

9. In paragraph (4) of section one hundred and thirty-seven (which relates to penal stoppages from the ordinary pay of officers), the words "or in the case of officers serving in India the Governor-General", the words "India or" and the words "for India or, as the case may be" shall be omitted.

10. In paragraph (12) of section one hundred and seventy-five and paragraph (11) of section one hundred and seventy-six which apply the Act to certain members of His Majesty's Indian Forces and to certain other persons the word "India" shall be omitted wherever it occurs.

11. In subsection (1) of section one hundred and eighty (which provides for the punishment of misconduct by civilians in relation to courts martial) the words "India or" shall be omitted wherever they occur.

12. In the provisions of section one hundred and eighty-three relating to the reduction in rank of non-commissioned officers, the words "with the approval of the Governor-General" shall be omitted in both places where they occur.

Part II

Modifications of Army Act.

Section 184 B (which regulates relations with the Indian Air Force) shall be omitted.

Part III

Modifications of Air Force Act.

1. In section 179D (which relates to the attachment of officers and airmen
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to Indian and Burma Air Forces), the words "by the Air Council and the Governor-General of India or, as the case may be," and the words "India or," wherever those words occur, shall be omitted.

2. In section 184B (which regulates relations with Indian and Burma Air Forces) the words "India or" and the words "by the Air Council and the Governor-General of India or, as the case may be," shall be omitted.

3. Sub-paragraph (c) of paragraph (4) of section one hundred and ninety (which provides that officers of His Majesty's Indian Air Force are to be officers within the meaning of the Act) shall be omitted.

APPENDIX II

Constituent States and Union Territories

FIRST SCHEDULE TO THE CONSTITUTION

[As amended by Section 2, the Constitution (Seventh Amendment) Act, 1956]

1. THE STATES

NAME	TERRITORIES
1. Andhra Pradesh	The territories specified in sub-section (1) of section 3 of the Andhra State Act, 1953 and the territories specified in sub-section (1) of section 3 of the States Reorganisation Act, 1956.
2. Assam	The territories which immediately before the commencement of the Constitution were comprised in the Province of Assam, the Khasi States and the Assam Tribal Areas, but excluding the territories specified in the Schedule to the Assam (Alteration of Boundaries) Act, 1951.
3. Bihar	The territories which immediately before the commencement of the Constitution were either comprised in the Province of Bihar or were being administered as if they formed part of that Province, but excluding the territories specified in sub-section (1) of section 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956.
* 4. Bombay	The territories specified in sub-section (1) of section 8 of the States Reorganisation Act, 1956

* Now comprises the two new States of Maharashtra and Gujarat under the Bombay Reorganisation Act, 1960.

5. Kerala The territories specified in sub-section (1) of section 5 of the States Reorganisation Act, 1956.
6. Madhya Pradesh The territories specified in sub-section (1) of section 9 of the States Reorganisation Act, 1956.
7. Madras The territories which immediately before the commencement of the Constitution were either comprised in the Province of Madras or were being administered as if they formed part of that Province and the territories specified in section 4 of the States Reorganisation Act, 1956, but excluding the territories specified in sub-section (1) of section 3 and sub-section (1) of section 4 of the Andhra State Act, 1953 and the territories specified in clause (b) of sub-section (1) of section 5, section 6 and clause (d) of sub-section (1) of section 7 of the States Reorganisation Act, 1956.
8. Mysore The territories specified in sub-section (1) of section 7 of the States Reorganisation Act, 1956.
9. Orissa The territories which immediately before the commencement of the Constitution were either comprised in the Province of Orissa or were being administered as if they formed part of that Province.
10. Punjab The territories specified in section 2 of the States Reorganisation Act, 1956.
11. Rajasthan The territories specified in section 10 of the States Reorganisation Act, 1956.
12. Uttar Pradesh The territories which immediately before the commencement of the Constitution were either comprised in the Province known as the United Provinces or were being administered as if they formed part of that Province.
13. West Bengal The territories which immediately before the commencement of the Constitution were either comprised in the Province of West Bengal or were being administered as if they formed part of that Province and the territory of Chandernagore as defined in clause (c) of section 2 of the Chandernagore (Merger) Act, 1954 and also the territories specified in sub-section (1) of section 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956.
14. Jammu and Kashmir The territory which immediately before the commencement of the Constitution was comprised in the Indian State of Jammu and Kashmir.

II. THE UNION TERRITORIES

NAME	EXTENT
1. Delhi	The territory which immediately before the commencement of the Constitution was comprised in the Chief Commissioner's Province of Delhi.
2. Himachal Pradesh	The territories which immediately before the commencement of the Constitution were being administered as if they were Chief Commissioners' Provinces under the names of Himachal Pradesh and Bilaspur.
3. Manipur	The territory which immediately before the commencement of the Constitution was being administered as if it were a Chief Commissioner's Province under the name of Manipur.
4. Tripura	The territory which immediately before the commencement of the Constitution was being administered as if it were a Chief Commissioner's Province under the name of Tripura.
5. The Andaman and Nicobar Islands	The territory which immediately before the commencement of the Constitution was comprised in the Chief Commissioner's Province of the Andaman and Nicobar Islands.
6. The Laccadive, Minicoy and Amindivi Islands	The territory specified in section 6 of the States Reorganisation Act, 1956.

APPENDIX III

The Legislative Lists

List I — Union List

1. Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation.
2. Naval, military and air forces; any other armed forces of the Union.
3. Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.
4. Naval, military and air force works.

5. Arms, firearms, ammunition and explosives.
6. Atomic energy and mineral resources necessary for its production.
7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.
8. Central Bureau of Intelligence and Investigation.
9. Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subjected to such detention.
10. Foreign Affairs; all matters which bring the Union into relation with any foreign country.
11. Diplomatic, consular and trade representation.
12. United Nations Organisation.
13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.
14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.
15. War and peace.
16. Foreign jurisdiction.
17. Citizenship, naturalisation and aliens.
18. Extradition.
19. Admission into, and emigration and expulsion from, India; passports and visas.
20. Pilgrimages to places outside India.
21. Piracies and crimes committed on the high seas or in the air; offences against the law of nations committed on land or the high seas or in the air.
22. Railways.
23. Highways declared by or under law made by Parliament to be national highways.
24. Shipping and navigation on inland waterways, declared by Parliament by law to be national waterways, as regards mechanically propelled vessels; the rule of the road on such waterways.
25. Maritime shipping and navigation, including shipping and navigation on tidal waters; provision of education and training for the mercantile marine and regulation of such education and training provided by States and other agencies.
26. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.
27. Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation, and the constitution and powers of port authorities therein.
28. Port quarantine, including hospitals connected therewith; seamen's and marine hospitals.
29. Airways; aircraft and air navigation; provision of aerodromes; regulation and organisation of air traffic and of aerodromes; provision for

aeronautical education and training and regulation of such education and training provided by States and other agencies.

30. Carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels.

31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.

32. Property of the Union and the revenue therefrom, but as regards property situated in a State specified in Part A or Part B of the First Schedule subject to legislation by the State, save in so far as Parliament by law otherwise provides.

33. Deleted.

34. Courts of wards for the estates of Rulers of Indian States.

35. Public debt of the Union.

36. Currency, coinage and legal tender; foreign exchange.

37. Foreign loans.

38. Reserve Bank of India.

39. Post Office Savings Bank.

40. Lotteries organised by the Government of India or the Government of a State.

41. Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers.

42. Inter-State trade and commerce.

43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies.

44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including universities.

45. Banking.

46. Bills of exchange, cheques, promissory notes and other like instruments.

47. Insurance.

48. Stock exchanges and futures markets.

49. Patents, inventions and designs; copyright; trademarks and merchandise marks.

50. Establishment of standards of weight and measure.

51. Establishment of standards of quality for goods to be exported out of India or transported from one State to another.

52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

53. Regulation and development of oilfields and mineral oil resources; petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable.

54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

55. Regulation of labour and safety in mines and oil fields.

56. Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

57. Fishing and fisheries beyond territorial waters.

58. Manufacture, supply and distribution of salt by Union agencies; regulation and control of manufacture, supply and distribution of salt by other agencies.

59. Cultivation, manufacture, and sale for export, of opium.

60. Sanctioning of cinematograph films for exhibition.

61. Industrial disputes concerning Union employees.

62. The institutions known at the commencement of this Constitution as the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial, and any other institution financed by the Government of India wholly or in part and declared by Parliament by law to be an institution of national importance.

63. The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the Delhi University, and any other institution declared by Parliament by law to be an institution of national importance.

64. Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.

65. Union agencies and institutions for

(a) professional, vocational or technical training, including the training of police officers, etc.

(b) the promotion of special studies or research; or

(c) scientific or technical assistance in the investigation or detection of crime.

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

67. Ancient and historical monuments and records, and archaeological sites and remains, declared by Parliament by law to be of national importance.

68. The Survey of India, the Geological, Botanical, Zoological and Anthropological Surveys of India; Meteorological organisations.

69. Census.

70. Union public services; all-India services; Union Public Service Commission.

71. Union pensions, that is to say, pensions payable by the Government of India or out of the Consolidated Fund of India.

72. Elections to Parliament, to the Legislatures of States and to the offices of President and Vice-President; the Election Commission.

73. Salaries and allowances of members of Parliament, the Chairman and Deputy Chairman of the Council of States and the Speaker and Deputy Speaker of the House of the People.

74. Powers, privileges and immunities of each House of Parliament and of the members and the committees of each House; enforcement of attendance of persons for giving evidence or producing documents before committees of Parliament or commissions appointed by Parliament.

75. Emoluments, allowances, privileges, and rights in respect of leave of absence, of the President and Governors; salaries and allowances of the Ministers for the Union; the salaries, allowances and rights in respect of leave of absence and other conditions of service of the Comptroller and Auditor-General.

76. Audit of the accounts of the Union and of the States.

77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practise before the Supreme Court.

78. Constitution and organisation of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practise before the High Courts.

79. Extension of the jurisdiction of a High Court having its principal seat in any State to, and exclusion of the jurisdiction of any such High Court from, any area outside that State.

80. Extension of the powers and jurisdiction of members of a police force belonging to any State to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of the powers and jurisdiction of members of a police force belonging to any State to railway areas outside that State.

81. Inter-State migration.

82. Taxes on income other than agricultural income.

83. Duties of customs including export duties.

84. Duties of excise on tobacco and other goods manufactured or produced in India except

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

85. Corporation tax.

86. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.
87. Estate duty in respect of property other than agricultural land.
88. Duties in respect of succession to property other than agricultural land.
89. Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights.
90. Taxes other than stamp duties on transactions in stock exchanges and futures markets.
91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.
92. Taxes on the sale or purchase of newspapers and on advertisements published therein.
93. Offences against laws with respect to any of the matters in this List.
94. Inquiries, surveys and statistics for the purpose of any of the matters in this List.
95. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List; admiralty jurisdiction.
96. Fees in respect of any of the matters in this List, but not including fees taken in any court.
97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

List II — State List

1. Public order (but not including the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power).
2. Police, including railway and village police.
3. Administration of justice; constitution and organisation of all courts, except the Supreme Court and the High Court; officers and servants of the High Court; procedure in rent and revenue courts; fees taken in all courts except the Supreme Court.
4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other States for the use of prisons and other institutions.
5. Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.
6. Public health and sanitation; hospitals and dispensaries.
7. Pilgrimages, other than pilgrimages to places outside India.
8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase, and sale of intoxicating liquors.

9. Relief of the disabled and unemployable.
10. Burials and burial grounds; cremations and cremation grounds.
11. Education including universities, subject to the provisions of entries 63, 64, 65 and 66 of List I and 25 of List III.
12. Libraries, museums and other similar institutions controlled or financed by the State; ancient and historical monuments and records other than those declared by Parliament by law to be of national importance.
13. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles.
14. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.
15. Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice.
16. Pounds and prevention of cattle trespass.
17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I.
18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.
19. Forests.
20. Protection of wild animals and birds.
21. Fisheries.
22. Courts of wards subject to the provisions of entry 34 of List I; encumbered and attached estates.
23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.
24. Industries subject to the provisions of entry 52 of List I.
25. Gas and gas-works.
26. Trade and commerce within the State subject to the provisions of entry 33 of List III.
27. Production, supply and distribution of goods subject to the provisions of entry 33 of List III.
28. Markets and fairs.
29. Weights and measures except establishment of standards.
30. Money-lending and money-lenders; relief of agricultural indebtedness.
31. Inns and inn-keepers.
32. Incorporation, regulation and winding up of corporations, other

than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

33. Theatres and dramatic performances; cinemas subject to the provision of entry 30 of List I; sports, entertainments and amusements.

34. Betting and gambling.

35. Works, lands and buildings vested in or in the possession of the State.

36. Deleted.

37. Elections to the Legislature of the State subject to the provisions of any law made by Parliament.

38. Salaries and allowances of members of the Legislature of the State, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof.

39. Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof, and, if there is a Legislative Council, of that Council and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the State.

40. Salaries and allowances of Ministers for the State.

41. State public services; State Public Service Commission.

42. State pensions, that is to say, pensions payable by the State or out of the Consolidated Fund of the State.

43. Public debt of the State.

44. Treasure trove.

45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.

46. Taxes on agricultural income.

47. Duties in respect of succession to agricultural land.

48. Estate duty in respect of agricultural land.

49. Taxes on lands and buildings.

50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

52. Taxes on the entry of goods into a local area for consumption, use or sale therein.

53. Taxes on the consumption or sale of electricity.
54. Taxes on the sale or purchase of goods other than newspapers.
55. Taxes on advertisements other than advertisements published in the newspapers.
56. Taxes on goods and passengers carried by road or on inland waterways.
57. Taxes on vehicles, whether mechanically propelled or not suitable for use on roads, including tramcars subject to the provisions of entry 35 of List III.
58. Taxes on animals and boats.
59. Tolls.
60. Taxes on professions, trades, callings and employments.
61. Capitation taxes.
62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.
63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.
64. Offences against laws with respect to any of the matters in this List.
65. Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this List.
66. Fees in respect of any of the matters in this List, but not including fees taken in any Court.

List III — Concurrent List

1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.
2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.
3. Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.
4. Removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in entry 3 of this List.
5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.
6. Transfer of property other than agricultural land; registration of deeds and documents.

7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.
8. Actionable wrong.
9. Bankruptcy and insolvency.
10. Trust and Trustees.
11. Administrators-General and official trustees.
12. Evidence and oaths; recognition of laws, public acts and records, and judicial proceedings.
13. Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.
14. Contempt of Court, but not including contempt of the Supreme Court.
15. Vagrancy; nomadic and migratory tribes.
16. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficient.
17. Prevention of cruelty to animals.
18. Adulteration of foodstuffs and other goods.
19. Drugs and poisons, subject to the provisions of entry 59 of List 1 with respect to opium.
20. Economic and social planning.
21. Commercial and industrial monopolies, combines and trusts.
22. Trade Unions; industrial and labour disputes.
23. Social security and social insurance; employment and unemployment.
24. Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.
25. Vocational and technical training of labour.
26. Legal, medical and other professions.
27. Relief and rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India and Pakistan.
28. Charities and charitable institutions, charitable and religious endowments and religious institutions.
29. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.
30. Vital statistics including registration of births and deaths.
31. Ports other than those declared by or under law made by Parliament or existing law to be major ports.
32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways subject to the provisions of List 1 with respect to national highways.

33. Trade and commerce in, and the production, supply and distribution of —

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products.

(b) foodstuffs, including edible oilseeds and oils;

(c) cattle fodder, including oilcakes and other concentrates,

(d) raw cotton, whether ginned or unginned, and cotton seed; and

(e) raw jute

34. Price control.

35. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied.

36. Factories.

37. Boilers.

38. Electricity.

39. Newspapers, books and printing presses.

40. Archaeological sites and remains other than those declared by Parliament by law to be of national importance.

41. Custody, management and disposal of property (including agricultural land) declared by law to be evacuee property.

42. Acquisition and requisition of property. [*The Constitution (Seventh Amendment) Act, 1956*]

43. Recovery in a State of claims in respect of taxes and other public demands, including arrears of land revenue and sums recoverable as such arrears, arising outside that State.

44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

45. Inquiries and statistics for the purposes of any of the matters specified in List II or List III.

46. Jurisdiction and powers of all Courts except the Supreme Court, with respect to any of the matters in this List.

47. Fees in respect of any of the matters in this List, but not including fees taken in any Court.

APPENDIX IV

Supplementary Notes

Page 15. **Written and Unwritten Constitutions.** The Constitutional Court of the West German Republic has expressed the view that the distinction between written and unwritten constitutions has no juridical basis of importance. The Court has observed: "Constitutional law does

not consist only of individual provisions of the Constitution but also contains certain directive principles and ideas which inspire and link together these constitutional norms. The Constituent Assembly has not certainly reduced into writing these principles and ideas, but there can be no doubt regarding their character as positive rules of constitutional law." The conclusion has, therefore, been drawn that there can be no clear distinction between written and unwritten constitutions. (BverfG., 1953. Vol. II., p. 403). Compare this with the observation made by Sir Owen Dixon, a Judge of the High Court of Australia: "Federalism means a rigid Constitution and a rigid Constitution means a written instrument. It is easy to treat the written instrument as the paramount consideration, unmindful of the part played by the general law notwithstanding that it is the source of the legal conceptions that govern us in determining the effect of the written instrument. Even in a unitary system of government the rules of the common law operate, in a way that is perhaps subtle and ill-defined but is yet effective, to impose conditions upon the actual exercise of legislative power.... Constitutional questions should be considered and resolved in the context of the whole law, of which the common law, including in that expression the doctrines of equity, forms not the least essential part." (31 A. L. J. p. 240)

Page 73. **Logical Interpretation.** The Federal Constitutional Court of the West German Republic has confirmed the theory of German jurists that every legal norm is complete in itself and, therefore, covers every possible case which falls within its ambit. The Court has, therefore, held that the meaning of constitutional provisions must be progressive and evolutionary and must cover matters not foreseen by the constituent authority. (BverfG., 1953. Vol. II., p. 401).

Page 76. **Logical Interpretation.** The same view was expressed by Stone, J. in *United States v. Classic*, 313 U. S. 299: "In determining whether a provision of the Constitution applies to a new subject matter, it is little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read the words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government."

Page 110. **Alteration of State Boundaries.** The safeguard provided in Article 3 of the Constitution has been whittled down by the Constitution (Fifth Amendment) Act, 1952 which authorises the President to prescribe the period during which the Legislatures of the States may express their views in regard to proposed changes in the boundaries or names of their

States. Contrast this position of the constituent States of the Indian Union with that of the States of the West German Republic. Articles 29 and 118 of the West German Constitution provide for referendum as a condition precedent to changes in the territorial limits of the States. This provision has been considered by the Federal Constitutional Court to be a corollary of the principle of democracy. (BverfG., 1952. Vol. I, p. 41)

Page 113. **Cession of Territory.** A distinction has been drawn between cession of territory and adjustment of boundaries. In *Nirmal Bose v. Union of India*, A. I. R. (1959) Cal. 306, Sinha, J. of the Calcutta High Court observed as follows: "If the adjustment of boundaries is no more than deciding a correct boundary between India and a foreign State, as made by the Radcliffe Award, then the adjustment of the boundaries simpliciter does not involve either giving up of territory or acquisition of territory. In other words, it is an ascertainment of what really belongs to India and no more. In such a case, Article 3 is not attracted at all and the matter would fall within Article 73 and I do not see why it cannot be done in exercise of the executive power of the Union, unless Parliament has by law provided that such a thing cannot be done by the exercise of such power. There is no such law in existence. On the other hand, where the adjustment of boundaries is effected by cession to a foreign power of territory belonging to India, then it would come within the purview of Article 3 because it must necessarily result in diminution of the area of a State belonging to the Indian Union."

Page 137. **Supremacy of Federal Laws.** In a recent case the High Court of Australia has held that Section 109 of the Commonwealth of Australia Act, 1900 gives paramountcy to a federal statute which empowers a Conciliation and Arbitration Tribunal to settle the rights and duties of the parties to a dispute in disregard of the provisions of a State law, with the result that the State law cannot validly operate where the Tribunal has exercised its authority to determine a dispute in disregard of the State regulation (*Robinson & Sons Ltd. v. Haylor*, 97 C. L. R. 177).

Page 144. **The Scope of Supremacy of Federal Laws.** In *Public Utilities Commission v. United States*, 355 U. S. 534, Douglas, J., delivering the judgement of the majority, referred to the observation made by Marshall, C. J. in *M'Culloch v. Maryland*, 4 Wheat. 316: "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."

Page 150. **The Test of Repugnancy.** The view that there cannot be a single test of repugnancy was endorsed by the Supreme Court of the United States in *Hines v. Davidowitz*, 312 U. S. 52, where Black, J., delivering the judgement of the Court, observed as follows: "This Court, in considering the validity of State laws in the light of treaties or federal laws

touching the same subject, has made use of the following expressions; conflicting; contrary to; occupying the field; repugnance; inconsistency; violation; curtailment and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the last analysis there can be no one crystal clear distinctly marked formula."

Page 170. **Delegated Legislation.** In a recent case the position has been further clarified by the Italian Constitutional Court. Dealing with a law of the Region of Sicily, the Court has laid down that a law delegating power to legislate is constitutionally valid only if it lays down the directive principles and criteria. (*Commissario dello Stato v. Region of Sicily*, Giur. cost. 1959. 757) Similarly, the Federal Constitutional Court of the West German Republic has held that it is a principle of the *Rechtsstaat* (a State governed by the rule of law) that the power of the executive to levy a tax by means of administrative decrees must be determined and delimited by a delegating law which must specify the content, the object, and the scope as well as the standard. (BverfG., 1959. Vol. VII., p. 278)

Page 187. **Effect of Unconstitutionality.** The West German Constitutional Court has also taken the view that an unconstitutional law is *nichtig* or null and void. (BverfG., 1953. Vol. II., p. 282) It would, therefore, appear that according to German constitutional law, a statute which has been declared to be unconstitutional cannot be revived in the event of a change in the provision of the Constitution.

Page 178. **The Doctrine of Pith and Substance.** In *A. S. Krishna v. State of Madras*, A. I. R. (1957) S. C. 297, the extent of the rule was thus stated by the Supreme Court: "The Privy Council had time and again to pass on the constitutionality of laws made by the Dominion and Provincial legislatures. It was in this situation that the Privy Council evolved the doctrine that for deciding whether an impugned legislation was *intra vires* regard must be had to its pith and substance." It was, however, argued on behalf of the respondent in *Hamdard Dawakhana v. Union of India*, A.I.R. (1966) S. C. 554, that the doctrine of pith and substance was applicable in a case where it was alleged that the impugned legislation contravened a fundamental right. The Court, however, expressly stated that it did not consider it necessary to decide the point, but the following observation made by the Court virtually amounted to an acceptance of the contention: "When the constitutionality of an enactment is challenged on the ground of violation of any of the articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary, i.e. its subject matter, the area it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended

to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy."

Page 191. **The Doctrine of Severability.** As we have already seen, the High Court of Australia has uniformly adopted "the test of novelty" in order to determine whether or not the rule of severability is applicable in a particular case. It has also been pointed out that this test was adopted by the Federal Court of India in *Shyamkant v. Ramihajan*, A. I. R. (1939) F. C. 74. However, in *R. M. D. Chamarbaugwalla v. Union of India*, A. I. R. (1957) S. C. 628, the Supreme Court of India has adopted the following "rules of construction" laid down by the courts in the United States of America regarding the application of the doctrine: (1) In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. (2) If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. (3) Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole. (4) Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety. (5) The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections; it is not the form but the substance of the matter which is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision there. (6) If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation. (7) In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it.

It is respectfully submitted that these "rules of construction" do not really provide a satisfactory solution to the problem. In particular, they confuse between tests of severability and cases where the doctrine is obviously inapplicable. It will no doubt be conceded that the question which

has to be determined in the first place is whether or not the valid and invalid parts of the impugned legislation are in fact separable upon a careful examination of the text of the legislation. If they are not, *adit questio*. Thus, the question of severability cannot arise in the following cases: (a) where the valid and invalid parts are so inextricably mixed up as to form a single, indivisible provision, as, for example, where the valid portions are merely ancillary to the invalid portions; (b) where the valid and invalid provisions form part of a single scheme so that, to use the words of the Privy Council, they are not "separable in operation"; and (c) where the valid portion cannot stand by itself and be enforceable after the invalid portion has been expunged. Secondly, it is only when the valid and invalid portions have been found to be divisible in fact according to the ordinary rules of interpretation that the question of the application of the rule of severability can arise. It is then that the Court has to ascertain the intention of the legislature which is undoubtedly "the determining factor". Three different tests have been adopted in this connection. According to the American decisions, "the test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid." This test has rightly been criticised by the High Court of Australia. For instance, Griffith, C. J. has pertinently observed in *Whybrow's case*, 11 C. L. R. 1: "What a man would have done in a state of facts which never existed is a matter of mere speculation, which a man cannot certainly answer for himself, much less for another." Moreover, it is the rule of the common law that the intention of the legislature must be ascertained from the text of the legislation and not by speculation or conjecture. It is for this reason that the High Court of Australia has adopted "the test of novelty". Griffith, C. J. has thus explained the test: "Whether the statute with the invalid portions omitted would be substantially a different law as to the subject matter dealt with by what remains from what it would be with the omitted portions forming part of it." We have already seen that this test was specifically accepted by the Federal Court of India. A third test has been adopted by the courts in Canada. This is the test of "partial execution". The rule has been thus stated: "Although part of a Dominion or provincial Act may be *ultra vires*, and, therefore, invalid, this will not invalidate the rest of the Act, if it appears that one part is separate in its operation from the other part, so that each is a separate declaration of the legislative will, and unless the object of the Act is such that it cannot be attained by a partial execution." (Lefroy, *Leading Cases in Canadian Constitutional Law*, p. 37) It is, however, submitted that the correct and most appropriate test is the one which has been adopted by the High Court of Australia.

An interesting illustration of the misapplication of the doctrine of severability is to be found in *Mahabooob Sheriff & Sons v. Mysore State Transport Authority*, A. I. R. (1960) S. C. 321. In that case the Court referred to the

principles laid down in *Chamarbaugwalla's case* and held that the case before the Court was covered by the first principle, i.e. whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. Therefore, the Court was of the opinion that the question before it resolved into this: would the Authority have ordered a renewal if it knew that it could not reduce the period of a permit below three years? The Court came to the conclusion that looking at the facts it was obvious that the Authority would have granted renewal in the circumstances. It, therefore, decided that it was open to it to sever the illegal part from the part that was legal, namely, the grant of the renewal. It is submitted with due respect that in coming to this decision the Supreme Court was really putting the cart before the horse, for the question of legislative intention could only arise if in fact the two parts were separable. But in this case this was not the position. On the contrary, it was a case where the valid and invalid parts were so inextricably mixed up that they could not be separated from one another. Here the impugned order was for the renewal of the permit for a period of one year. It was the term of the renewal which was contrary to the statute; hence if this portion was expunged the order would have been merely for the renewal of the permit, but such an order was not complete in itself and could not stand under the statute unless it was so modified as to make the renewal valid for the minimum period prescribed by the statute. Therefore, it is obvious that the doctrine of severability could not be applicable. In support of its decision the Supreme Court referred to its earlier decision in *Sewpujanrai Indrasaurai Ltd. v. The Collector of Customs*, A. I. R. (1958) S. C. 845, where the application of the doctrine of severability was extended to orders issued in the exercise of statutory powers. But, as was rightly pointed out by Kapur, J. in his dissenting judgement, the order in *Sewpujanrai's case* included two illegal conditions imposed by the Collector of Customs and these could be separated and the rest of the order could stand without any alteration or modification. The case, therefore, clearly fell within the rules of construction accepted by the Supreme Court in *Chamarbaugwalla's case*. This could not, however, be said of the impugned order in the present case. For these reasons it is difficult to reconcile this decision of the Supreme Court with the generally accepted principles of law on the subject.

Page 202. **Obligation of the Constituent States.** Whereas the Indian Constitution deals only with the obligation of the States to the Union, the Constitution of the West German Republic imposes on the Federation as well as on the constituent States the reciprocal obligation of "friendly conduct within the Federation". (*Bundesfreundlichen Verhaltens*) The Constitutional Court of the Republic has thus clarified this provision: "The principle of friendly conduct within the Federation, which is equally applicable to the Federal State as well as to the *Laender*, is intended to knit

together the parts of the Federal State, the Federation and the States, which are dependent on one another under the common constitutional legal order and not to loosen the federal structure. Therefore, neither part can evade its duty of friendly federal conduct merely by asserting or proving that the other part has not fulfilled its obligation of friendly federal conduct." (BverfG. 1959. Vol. VIII., p. 122)

Page 246. **Tax on Sale or Purchase in the Course of Import.** In a recent case the rule was thus stated by Subba Rao, J.: "The legal position vis-à-vis the import-sale can be summarised thus: (1) the course of import of goods starts at a point when the goods cross the customs barrier of the foreign country, and ends at a point in the importing country after the goods cross the customs barrier; (2) the sale which occasions the import is a sale in the course of import; (3) a purchase by an importer of goods when they are on the high seas by payment against shipping documents is also a purchase in the course of import; and (4) a sale by an importer of goods, after the property in the goods passed to him either after the receipt of the documents of title against payment or otherwise to a third party by a similar process is also a sale in the course of import." The Court, therefore, held that where the importer, pursuant to the earlier contracts entered into with the Government of India, delivered the shipping documents, including the bill of lading to the Government against payment when the goods were on the high seas, the sales fell under the fourth principle and, therefore, they were sales that took place in the course of import of the goods into India. [*J. V. Gokal & Co. v. Assistant Collector, Sales Tax*, A. I. R. (1960) S. C. 595]

Page 331. **The Right of Secession.** The question has often been raised as to whether the members of the British Commonwealth of Nations have the right to secede from the Commonwealth. It is obvious that the same answer cannot be applicable to the two different categories of members. As regards the first category, "the balance of authority", as Sir B. N. Rau points out, would appear to be in favour of Keith's view that these Dominions cannot legally secede from the Commonwealth by unilateral action. (*India's Constitution in the Making*, p. 165) Keith's argument is that "the Dominions were created as organised governments under the British Crown, and there is no provision in their constitution which contemplates that they have the right to eliminate the Crown or sever their connection with it." According to him, in order to be effective, secession must be under a statute of the Parliament of the United Kingdom as well as under the statute of the Dominion concerned. He also expresses the view that "the concurrence of the other Dominions would also be requisite." Sir Ivor Jennings is also of the opinion that "a Dominion does not secede merely by establishing a republican form of government." (*Constitutional Laws of the Commonwealth*, p. 147). Support for this view is to be found

in the judgement of Viscount Caldecote, C.J. in *Murray v. Parkes*, (1942) 2 K. B. 123; In that case the appellant was charged under the National Service (Armed Forces) Act, 1939, with failing to submit himself for medical treatment. He contended that he was a citizen of Eire and not a British subject and was not, therefore, governed by the provisions of the Act. While rejecting this plea, Viscount Caldecote observed: "The removal by the Statute of Westminster in 1931 of any restriction upon the power of the legislature of the Irish Free State to pass legislation, whether repugnant or not to an Imperial Act, did not either expressly or by implication provide for any separation, described sometimes as the right to secede from the British Commonwealth of Nations." He also held that the Government of Eire had not declared that "the so-called right to secede has in fact been exercised". He went on to add that if in fact the Government of Eire did make such a declaration, "it would then be a matter for consideration whether secession by Eire could be effective unless and until the other members of the British Commonwealth of Nations had given recognition to Eire as a foreign State." The question was, therefore, left open and it is still a debatable point. It is, however, obvious that the question cannot be answered on the basis of any a priori assumptions or theories. The main question is whether the Dominion concerned enjoys full constituent powers or not. If it does, it is legally competent to terminate its constitutional nexus with the British Crown. In that event it ceases to be a part of Her Majesty's Dominions and, therefore, loses its status as a member of the British Commonwealth of Nations. On the other hand, if it ceases to be a British Dominion, it can only remain a member of the Commonwealth with the concurrence of the other members and subject to such terms as they may decide to lay down. This is exactly what happened in the case of India.

As regards the members belonging to the second category, their membership of the Commonwealth arises from an agreement or treaty, although not of a formal character, between them and the other members of the Commonwealth. In their case, therefore, the right to secede exists and can be exercised by unilateral denunciation of the agreement on such grounds as they may consider adequate.

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Country.	Name.	Abbreviation.
Argentina.	Fallos de la Corte Suprema.	Fallos.
Australia.	Commonwealth Law Reports.	C.L.R.
Austria.	Oesterreichische Juristenzeitung.	Oest. Jur.
Belgium.	Pasicrisie Belge.	Pasicrisie.
Brazil.	Revista Forense.	Rev. For.
Canada.	Dominion Law Reports.	D.L.R.
Eire.	Irish Reports.	I.R.
France.	Sirey, Recueil générale. Daloz, Recueil périodique.	Sirey. Daloz.
Germany.	Entscheidungen des Reichsgerichts in Zivil Sachen. Entscheidungen des Bundesverfassungs- gericht.	R.G.Z. BverfG.
India.	All India Reporter.	A.I.R.
Italy.	Giurisprudenza costituzionale. Giurisprudenza italiana. Foro italiano.	Giur. cost. Giur. it. For. it.
Mexico.	Semanario judicial. Jurisprudencia de la Suprema Corte.	Sem. jud. Jur. mp.
Switzerland.	Arrêts de Tribunal fédéral.	Arr. T.F.
United Kingdom.	All England Reports.	All E.R.
United States.	United States Reports.	U.S.

N.B. For other English Law Reports the usual abbreviations have been used.

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